82-139

No. ____

Office - Supreme Court, U.S.
FILED
JUL 26 1982
ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

JACOBY & MEYERS, a partnership,

Appellant,

—VS.—

SUPREME COURT OF NEW JERSEY; ADVISORY COMMITTEE ON PROFESSIONAL ETHICS OF THE SUPREME COURT OF NEW JERSEY; and NEW JERSEY STATE BAR ASSOCIATION,

Appellees.

ON APPEAL FROM THE
SUPREME COURT OF NEW JERSEY

JURISDICTIONAL STATEMENT

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QUESTION PRESENTED

Does DR 2-102(C), a Rule of Discipline of the New Jersey Supreme Court, which prohibits the use of the firm name of a multi-state law firm in New Jersey, unless each "named" partner was or is a member of the New Jersey Bar, violate the First and Fourteenth Amendments (free speech), Article I, Section 8 (Commerce Clause), Article IV, Section 2 (Privileges and Immunities Clause), and Fourteenth Amendment (Equal Protection Clause) of the Constitution of the United States, as applied to a multi-state law firm,

Jacoby & Meyers, which seeks to add a New Jersey partner and open a New Jersey office staffed with New Jersey licensed counsel, and to continue to do business under its present firm name?

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Opinion 475 of the Advisory Committee on Professional Ethics of the Supreme Court of New Jersey is reported at 107 New Jersey Law Journal 283 (April 2, 1981) - Appendix A.

The Opinion of the New Jersey Supreme Court is reported at 89 N.J. 74, 444 A.2d 1092 (N.J. April 28, 1982) - Appendix B.

JURISDICTION

This is a civil proceeding brought before the Supreme Court of New Jersey to attack the constitutionality of DR 2-102(C), a rule of Discipline promulgated by the

Supreme Court of New Jersey. Appellant first sought relief before the Advisory Committee on Professional Ethics of the Supreme Court of New Jersey, which rejected appellant's request on April 2, 1981. See 107 N.J.L.J. 283 (1981) (Appendix A). Although the Advisory Committee had no authority to consider constitutional challenges to rules adopted by the New Jersey Supreme Court, appellant first had to seek relief before the Advisory Committee.

Upon receipt of the adverse opinion, appellant promptly brought the appropriate proceeding

by petitioning the Supreme Court of New Jersey for relief. In its Petition filed with the Supreme Court of New Jersey appellant raised, and that Court considered, each of the constitutional challenges set forth herein.

According to New Jersey law and to a recent opinion of this Court, appellant utilized the proper procedure and appropriate forum for making its constitutional challenge to DR 2-102(C). In Middlesex County Ethics Committe v. Garden State Bar Ass'n., _____U.S. _____, _____ L.Ed. 2d _____, _____ S.Ct. _____50 U.S.L.W. 4712 (No.

81-460, June 21, 1982), this Court unanimously reversed the United States Court of Appeals for the Third Circuit and stated that the New Jersey Supreme Court, not the federal district court, was the appropriate forum for resolving constitutional challenges to disciplinary rules promulgated by the New Jersey Supreme Court.[1/]

[1/] The basis of this Court's ruling was the abstention doctrine of Younger v. Harris, 401 U.S. 37 (1971). In the Middlesex County Ethics Committee case the disciplinary proceeding had been instituted prior to the filing of the federal lawsuit. Here, in contrast, appellant chose to litigate the issue in the New Jersey Supreme Court. While appellant could have initially challenged DR 2-102(C) in (cont.)

On July 20, 1982, appellant filed a Notice of Appeal in the Supreme Court of New Jersey. Because appellant has challenged the constitutionality of a state rule, which challenge was rejected

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1/ (cont.)

the federal district court without even having to exhause state administrative remedies, see Patsy v. Board of Regents, ____U.S.____, ____L.Ed. 2d ____, ____S.Ct.____, ____U.S.L.W. ____ (No. 80-1874), June 21, 1982), It was free to make its challenge in the state courts instead of the federal courts. While not constitutionally compelled to do so, appellant pursued its remedy in the New Jersey Supreme Court, which this court recently stated was fully capable of considering federal constitutional claims. Middlesex County Ethics Committee v. Garden State Bar Ass'n., supra.

by the highest state court in which a decision could be had - the Supreme Court of New Jersey - this Court's appellate jurisdiction has properly been invoked. See 28 U.S.C. Section 1257(2).

For purposes of appellate review under 28 U.S.C. Section 1257(2) a disciplinary rule of a state supreme court is considered as a statute. See Bates v. State Bar of Arizona, 433 U.S. 350, 53 L.Ed. 2d 810, 97 S.Ct. 2691 (1977). In Bates, the appellants challenged in the Arizona Supreme Court the constitutionality of a disciplinary rule adopted and

enforced by the Arizona Supreme Court. After that Court rejected their constitutional claims, appellants appealed to this Court, which first noted probable jurisdiction, 429 U.S. 812, 50 L.Ed.. 2d 73, 97 S.Ct. 53 (1976) and then reversed the Arizona Supreme Court on the First Amendment claim.

Other cases involving disciplinary rules which this Court has reviewed on appeal include Re R.M.J., _____U.S._____, 71 L. Ed. 2d 64, 102 S.Ct. 929 (1982); In re Primus, 436 U.S. 412, 56 L.Ed. 2d 417, 98 S.Ct. 1893 (1978); and

Ohralik v. Ohio State Bar Assn., 436 U.S. 447, 56 L.Ed. 2d 444, 98 S.Ct. 1912 (1978).

CONSTITUTIONAL AND REGULATORY PROVISIONS INVOLVED

ARTICLE I, Section 8 (Commerce Clause):

> The Congress shall have power . . . to regulate commerce . . . among the several states. . . .

ARTICLE IV, Section 2 (Privileges and Immunities):

> The citizens of each state shall be entitled to all privileges and immunities of citizens in the several states. . . .

FIRST AMENDMENT (Free Speech):

> Congress shall make no law . . . abridging the freedom of speech. . . .

FOURTEENTH AMENDMENT (Free speech, due process, equal protection, privileges and immunities):

> 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or

immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

DISCIPLINARY RULE 2-102(C) OF THE SUPREME COURT OF NEW JERSEY:

A lawyer shall not hold himself out as having a partnership with one or more lawyers unless they are in fact

partners. A partnership shall not be formed or continued between or among lawyers licensed in different jurisdictions unless all enumerations of the members and associates of the firm on its letterhead and in other permissible listings make clear the jurisdictional limitations on those members and associates of the firm not licensed to practice in all listed jurisdictions; provided, however, a firm

name may not be used in New Jersey unless all those named are or were members of the bar in New Jersey.

DR 2-102(D) OF THE CODE OF PROFESSIONAL RESPONSIBILITY OF THE AMERICAN BAR ASSOCIATION:

A partnership shall not be formed or continued between or among lawyers licensed in different jurisdictions unless all enumerations of the members and associates of the firm on its letterhead and in other permissible listings make

clear the jurisdictional limitations on those members and associates of the firm not licensed to practice in all listed jurisdictions; however, the same firm name may be used in each jurisdiction.

STATEMENT OF THE CASE

In 1972, Leonard Jacoby and Stephen Meyers, members of the California bar, formed a profit-making law firm (appellant) to serve a large middle-class clientele with basic, standardized legal services. Beginning in California,

appellant expanded considerably during the 1970's using media advertising and operating out of many neighborhood law offices staffed by local attorneys.[2/] In 1979, appellant opened neighborhood offices in New York under its California name, Jacoby & Meyers. A third partner, licensed to practice law in New York, oversees its operations there. Appellant

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[2/] For additional details concerning appellant's activities in California see Jacoby v. State Bar, 19 Cal. 3d 359, 138 Cal. Rptr. 77, 562 P.2d 1326 (1977), which anticipated this Court's decision in Bates v. State Bar of Arizona, 433 U.S. 350, 53 L.Ed. 2d 810, 97 S.Ct. 2691 (1977).

currently has 75 offices and interviews over 500 clients per day, accepting about 600 new matters each week.

Appellant is the largest and oldest of the law firms in the country that specifically direct their practice toward the middle income client, and its name has recognition as such to the public and the legal community. The ability of appellant to provide quality legal services to the middle income consumer at reasonable and affordable prices depends upon streamlined office procedures that the firm has developed over the

years and uses in its neighborhood offices. The firm name is thus identifiable with its concept of and procedures for delivering legal services to the middle income client.

Appellant uses television advertising in New York that reaches consumers of legal services in New Jersey. In 1980, appellant notified appellee Advisory Committee on Professional Ethics of the Supreme Court of New Jersey that it wished to open a law office in New Jersey under its name, JACOBY & MEYERS.

Appellant advised appellee Committee that its New York letter-

head distinguished between the named partners, who were and are members of the California bar and the New York partner, Gail J. Koff, who was and is licensed in New York. Appellant stated that it would make any other adjustments required by the Committee to conform to the spirit of DR 2-102(C), a New Jersey Disciplinary Rule which prohibits the use of a law firm name in New Jersey ". . . unless all those named are or were members of the bar in New Jersey."[3/]

3/ The complete text of DR 2-102(C) is set forth supra at pages 10-12.

New Jersey's rule is in direct conflict with the Code of Professional Responsibility of the American Bar Association, which specifically provides that ". . . the same firm name may be used in each jurisdiction.[4/] On April 2, 1981, the appellee Advisory Committee rejected appellant's request in Ethics Opinion No. 475, 107 N.J.L.J. 283 (1981) (Appendix A). The following day, April 3, 1981, appellant instituted the appropriate civil proceeding

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[4/] The complete text of DR 2-102(D) of the Code of Professional Responsibility of the American Bar Association is set forth supra at pages 12-13.

in the Supreme Court of New Jersey, which has jurisdiction. Middlesex County Ethics Committee v. Garden State Bar Association, supra. Appellee Supreme Court of New Jersey granted a motion filed by appellee New Jersey State Bar Association to intervene to support DR 2-102(C).

Appellee Supreme Court of New Jersey conducted oral argument on October 5, 1981, and rendered its decision on April 28, 1982, which considered and rejected all of appellant's constitutional challenges to DR 2-102(C). Appellants having failed in the Supreme

Court of New Jersey, duly filed a Notice of Appeal so that this Court could consider the substantial federal constitutional challenges to DR 2-102(C).

THE QUESTION IS SUBSTANTIAL

The question presented by this appeal is substantial enough for this Court to note probable jurisdiction and render an opinion on the merits.

The number of national or multi-state law firms has grown to the point where it has become appropriate for this Court to resolve a matter that has received different responses throughout our

land. This Court has frequently reviewed cases involving lawyers and the practice of law.[5/] See, e.g., Re R.M.J., _____ U.S._____ 71 L.Ed. 2d 64, 102 S.Ct. 939 (1982); Branti v. Finkel, 445 U.S. 507, 63 L.Ed. 2d 574, 100 S.Ct. 1287 (1980); Leis v. Flynt, 439 U.S. U.S. 438, 58 L.Ed. 2d 717, 99 S.Ct. 698 (1979); In re Primus, 436 U.S. 412, 56 L.Ed. 2d 417, 98 S.Ct. 1893 (1978); Ohralik v. Ohio State Bar

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5/ Recently in Middlesex County Ethics Committee v. Garden State Bar Association, supra, this Court ruled that the federal district court should have abstained because the dispute was already being considered by the New Jersey Supreme Court.

Assn., 436 U.S. 447, 56 L.Ed 2d 444, 98 S.Ct. 1917 (1978); Goldfarb v. Virginia State Bar, 421 U.S. 773, 44 L.Ed 2d 572, 95 S.Ct. 2009 (1975); United Transportation Union v. The State Bar of Michigan, 401 U.S. 576, 28 L.Ed. 2d 339, 91 S.Ct. 1076 (1971); Baird v. State Bar of Arizona, 401 U.S. 1, 27 L.Ed. 2d 639, 91 S.Ct. 702 (1971); United Mine Workers v. Illinois Bar Asso., 389 U.S. 217, 19 L.Ed. 2d 426, 88 S.Ct. 353 (1967); Brotherhood of Railroad Trainmen v. Virginia Ex Rel Virginia State Bar, 377 U.S. 1, 12 L.Ed. 2d 89, 84 S.Ct. 1113 (1964); NAACP v. Button, 371 U.S.

415, 9 L.Ed. 2d 405, 83 S.Ct. 328 (1963); Cohen v. Hurley, 366 U.S. 117, 6 L.Ed. 2d 1568, 81 S.Ct. 954 (1961); In re Anastaplo, 366 U.S. 82, 6 L.Ed 2d 135, 81 S.Ct. 978 (1961); Konigsberg v. State Bar of California, 366 U.S. 36, 6 L.Ed. 2d 105, 81 S.Ct. 997 (1961). However, this Court has never ruled on the issue presented herein.

The rule is in direct conflict with the Code of Professional Responsibility of the American Bar Association, which specifically and expressly permits the use of a firm name in jurisdictions where not all of the named parties are licensed to practice. While

rules of the American Bar Association may not command the same respect as the Constitution they are not totally without significance. They are entitled to some consideration. See Hanrahan v. Hampton, 466 U.S. 1301, 64 L.Ed. 214, 100 S.Ct. 1868 (1980) (Justice Rehnquist denied recusal motion on basis of American Bar Association Code of Judicial Conduct).

While regulation of attorneys and the practice of law is primarily a matter for state regulation, this Court has not hesitated to invalidate state bar rules in conflict with the Constitution. See, e.g., Re R.M.J., _____U.S._____,

71 L.Ed. 64, 102 S.Ct. 929 (1982) and Bates v. Arizona, 433 U.S. 350, 53 L.Ed. 2d 810, 97 S.Ct. 2691 (1977).

At this point, it is appropriate to analyze the specific constitutional provisions with which DR 2-102(C) is in conflict. Each raises substantial constitutional questions which this Court ought to answer.

A. DR 2-102(C) VIOLATES THE FREE SPEECH GUARANTEES OF THE FIRST AND FOURTEENTH AMENDMENTS.

This Court should decide whether the Supreme Court of New Jersey mistakenly relied upon this Court's 7-to-2 decision in Friedman v. Rogers, 440 U.S. 1, 59 L.Ed. 2d 100, 99 S.Ct. 887 (1979)

in upholding Rule 2-102(C). Friedman v. Rogers is only superficially similar to the instant case.

In Friedman v. Rogers, supra, this Court, in an opinion authored by Justice Powell, upheld a Texas statute which prohibited the practice of optometry under a trade name. However, the majority opinion carefully pointed out that the prohibition was a response to the extensive misuse of trade names by optometrists in Texas.

Indeed, the narrow scope of the holding in Friedman v. Rogers was recently recognized by this

Court in Re R.M.J., _____U.S._____, 71 L.Ed. 2d 64, 102 S.Ct. 929 (1982), where Justice Powell, this time writing for a unanimous Court, stated,

> . . . [I]n Friedman v. Rogers . . . we held that Texas could prohibit the use of trade names by optometrists particularly in view of the considerable history in Texas of deception and abuse worked upon the consuming public through the use of trade names.

In contrast there is no evidence that law firms have ever engaged in the kind of deception

and abuse described by this Court in Friedman v. Rogers. Indeed, the trend, evidenced by the 1970 change in the Code of Professional Responsibility of the American Bar Association, is in the direction of multi-state law firms. Only New Jersey and Nevada prohibit the use of law firm names if one or more of the partners was or is not licensed in the state.

The New Jersey Supreme Court could point to no evidence of any abuse by law firms in any of the numerous jurisdictions throughout this land where multi-state law

firms are permitted to function. Instead, the court postulated hypothetical problems which have never occurred in the practice of law by multi-state law firms. For example, the New Jersey Supreme Court suggested that without the rule a client may believe Mr. Jacoby or Mr. Meyers might handle his or her case. To protect this hypothetical client, New Jersey says the rule is needed.

With all due respect, this is obviously not the basis for the rule. There is no evidence that in today's world clients have been disappointed by not meeting Mr.

Sullivan of Sullivan and Cromwell or Mr. Cravath of Cravath, Swaine & Moore.[6/]

Application of this Court's First Amendment - commercial speech analysis of Central Hudson Gas & Electric Corp. v. Public Service Commission of New York, 447 U.S. 557, 65 L.Ed. 2d 341, 100 S.Ct. 2343 (1980) to New Jersey's rule reveals the real purpose of the rule: to protect New Jersey lawyers from competition. That this is the case is apparent

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6/ Sullivan and Cromwell and Cravath, Swaine & Moore are New York law firms.

from the fact that the names of deceased New Jersey lawyers may be used in a firm's name.[7/] If the New Jersey Supreme Court is concerned about the client who believes Mr. Jacoby or Mr. Meyers

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[7/] DR 2-102(B) permits the names of retired or deceased partners to remain in the firm's name. DR 2-102(B) provides in pertinent part:

> The name of a lawyer who assumes a judicial or other office or position and is thereby prohibited from practicing law or who ceases for reasons other than death or retirement to be associated with a law firm shall not be used in the firm name or in professional notices of or public communications by the firm.

will draft his Will, why is it not likewise concerned about the client who mistakenly believes a deceased former partner will draft his Will.

In Friedman v. Rogers, supra, this Court justified the total prohibition against trade names partly on the basis that Texas has a right to make sure prospective customers or patients do not mistakenly believe former optometrists who have long since departed still work for the company.

The Court made the point in these words:

> The possibilities for deception are numerous. The trade name of an optometrical practice can remain unchanged despite changes in the staff of optometrists upon whose skill and care the public depends when it patronizes the practice. Thus, the public may be attracted by a trade name that reflects the reputation of an optometrist no longer associated with the practice. . . .

Friedman v. Rogers, 440 U.S. 1, 13, 59 L.Ed. 2d 100, 112, 99 S.Ct. 887 (1979).

By permitting the names of former partners to remain in the firm name, the New Jersey Supreme Court allows this kind of "deception." Of course, appellant does

not believe it is deceptive, and neither does New Jersey. Moreover, New Jersey does not really believe the use of a multi-state law firm's name in New Jersey would be deceptive. The New Jersey Supreme Court does believe, however, that it would be competitive. The Court's concern about competition is revealed in its discussion about television advertising:

> . . . We do know that if petitioner were allowed to use its firm name in New Jersey in <u>any</u> form its television advertising could give it a substantial competitive advantage.
> Appendix B, pp. 41-42.

Having revealed the true purpose behind DR 2-102(C) and having pointed out that the stated purpose is false because New Jersey permits the names of deceased partners to remain, appellant now returns to the four part analysis of Central Hudson. That analysis establishes the conflict between DR 2-102(C) and the First Amendment: New Jersey does not have a substantial legitimate governmental interest (protecting New Jersey lawyers from competition is not legitimate); the rule does not directly advance New Jersey 's stated interest - prevention of deception.

While appellant believes the dissenting opinion of Justice Blackmun in Friedman v. Rogers is more persuasive than the majority, nevertheless, even the majority's opinion does not justify the ruling below. This Court should note probable jurisdiction in order to resolve the substantial question unanswered by Friedman v. Rogers, which recognized that this is an "unchartered area" of First Amendment law. Id., at 10, n. 9, 59 L.Ed. 2d 100, 110, 99 S.Ct. 887 (1979).

B. RULE DR 2-102(C) VIOLATES THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT.

This Court has developed two different standards for determining whether a statute violates the Equal Protection Clause of the Fourteenth Amendment. If a statute does not make distinctions based on suspect classes, such as race or religion, or does not affect a fundamental right, such as free speech, then the distinctions made by the statute are to be upheld if rational. See, e.g., Allied Stores v. Bowers, 358 U.S. 522, 530, 3 L.Ed. 2d 480, 79 S.Ct. 437 (1959), cited by the court below.

However, if free speech is implicated, the statute is to be subjected to strict scrutiny. See, e.g., Police Department v. Mosley, 408, U.S. 92, 33 L.Ed. 2d 212, 92 S.Ct. 2286 (1972), where this Court struck down a Chicago ordinance which prohibited picketing near a school, but which exempted labor picketing from the ban. The Court "carefully scrutinized" (Id., at 99, 33 L.Ed. 2d at 218, 92 S.Ct. 2286) the ordinance and found it to be violative of the Equal Protection Clause.

The Court noted that "the equal protection claim" was "closely intertwined with First Amendment

interests . . ." Id. at 95, 33 L.Ed. 2d at 216, 92 S.Ct. 2286 (1972).

With this well established doctrine in mind we proceed to review the New Jersey Supreme Court's response to appellant's Equal Protection attack on the New Jersey rule that prohibits out-of-state atorneys' names from appearing in the firm name yet permits the names of long departed New Jersey attorneys to be retained by the law firms. The New Jersey Supreme Court arrived at the wrong conclusion because it applied the wrong standard of review. The Court assumed that there is no free

speech interest in a trade name and simply applied the rational basis test which is used to analyze statutes which do not involve fundamental rights or do not make distinctions on the basis of suspect classifications.

The New Jersey Supreme Court apparently misread this Court's opinion in Friedman v. Rogers, supra, which did not say that trade names are not speech. To the contrary, this Court recognized the commercial speech aspect of a trade name:

> . . . The use of trade names in connection with optometrical practice, then, is a form of

> commercial speech and nothing more.
>
> Id., at 11, 59 L.Ed. 2d at 111, 99 S.Ct. 887 (1979).

It is true that this Court, concluding that commercial speech is entitled to less protection under the First Amendment than political speech, went on to uphold the Texas ban against the use by optometrists of trade names. However, this Court did not say that trade names were not speech. Thus, the New Jersey Supreme Court erred in not applying the strict scrutiny test to its rules which distinguish between deceased

partners and out-of-state attorneys with respect to law firm names.

It does not matter that the form of speech involved herein - commercial speech, is less protected than political speech. This Court has applied the strict scrutiny test to forms of speech less protected by the First Amendment than pure political speech. For example, picketing per se has not been considered to be pure speech because of its physical nature. Yet, laws regulating picketing are subject to strict scrutiny analysis. See, Police Department v. Mosely, 408 U.S. 92, 33 L.Ed. 2d 212, 92 S.Ct. 2286 (1972). Chicago's

ordinance prohibiting picketing near schools was not invalidated on First Amendment grounds; rather, it was struck down under the Fourteenth Amendment because "labor" picketing was exempt.

Similarly, this Court should strike down New Jersey's rule because it discriminates between former partners and out-of-state attorneys, permitting the names of the former and prohibiting the names of the latter. As stated earlier under the Free Speech argument, this Court recognized in Friedman v. Rogers the deceptive nature of a trade name which "reflects the reputation of an

optometrist no longer associated with the practice. . . ." Friedman v. Rogers, 440 U.S. at 13, 59 L.Ed. 2d at 112, 99 S.Ct. 887 (1979).[8/]

This Court should note probable jurisdiction to consider the substantial question of whether the strict scrutiny analysis of Police Department v. Mosely, 408 U.S. 92, 33 L.Ed. 2d 212, 92 S.Ct. 2286

8/ As stated earlier, appellants disagree with the Court's decision in Friedman v. Rogers. However, it does support appellant's Equal Protection challenge here. If New Jersey wants to protect the public from deception it cannot permit deceased partners' names to remain. Of course, appellants do not believe this is the true purpose of the rule.

(1972) should be applied to commercial speech.[9/]

C. DR 2-102(C) VIOLATES THE COMMERCE CLAUSE.

This Court recognized in Goldfarb v. Virginia State Bar, 421 U.S. 773, 44 L.Ed. 2d 572, 95 S.Ct. 2004 (1975) that legal services are a part of interstate commerce. The Court ruled a Virginia fee schedule for attorneys to be in violation of the Sherman Act. However, as the New Jersey

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9/ Appellants also submit that under the rational basis test the rule is invalid. There is no rational basis for prohibiting out-to-state lawyers' names while permitting the names of deceased partners.

Supreme Court properly observed, this Court was careful to emphasize that it intended "no diminution of the authority of the State to regulate its professions." Id., at 793, 44 L.Ed. 2d at 588, 95 S.Ct. at 2016.

Left unanswered, however, was the question of whether a state could adopt rules for lawyers which were designed to protect them from out-of-state competition. The Supreme Court of New Jersey seems to have admitted it is concerned about competition:

> We do know that if petitioner were allowed

> to use its firm name in New Jersey in any form its television advertising could give it a substantial competitive advantage. (Emphasis in original) (Appendix B, pp. 41-42.)

Its comment, however, was made in the context of its First Amendment discussion. The New Jersey Supreme Court quickly forgot its concern about competition when it discussed the Commerce Clause issue. The court acknowledged this Court's ruling in Philadelphia v. New Jersey, 437 U.S. 617, 57 L.Ed. 2d 475, 98 S.Ct. 2531 (1978) that statutes enacted for the purpose of protecting local economic interests are virtually per se invalid. Thus, the New Jersey Supreme Court

failed to mention its concern about competition when it discussed the Commerce Clause issue. Expression of concern about competition in the context of the Commerce Clause discussion would have exposed the violation.

Instead, the New Jersey Supreme Court repeated its concern about protecting the public from deception, a concern already demonstrated herein to be without merit.

Now that the American Bar Association has recognized the propriety of multi-state law firms utilizing their firm names and numerous firms have taken advantage

of it, this Court should note probable jurisdiction to consider whether New Jersey, virtually alone on this point, may protect its own lawyers by interfering with the right of multi-state firms to use their names in New Jersey. This Court should decide whether New Jersey's rule is consistent with Goldfarb v. Virginia, supra, and Philadelphia v. New Jersey, supra.

D. DR 2-102(C) VIOLATES THE PRIVILEGES AND IMMUNITIES CLAUSE.

The New Jersey Supreme Court, relying upon this Court as authority, correctly stated that

> The Privileges and Immunities Clause insures that non-residents and residents receive equal treatment with respect to 'fundamental' activities whose restriction would 'hinder the formation, the purpose, or development of a single union.'

Yet the court below went on to conclude that since the right to practice law is not a fundamental right, relying on Leis v. Flynt, 439 U.S. 438, 58 L.Ed. 2d 717, 99 S.Ct. 698 (1979) (5 to 4 opinion upholding refusal to permit New York lawyers to represent defendant in Ohio criminal case), appellant's challenge to DR 2-102(C) must fail.

With all due respect to the New Jersey Supreme Court, this case does not depend upon the issue of whether the right to practice law is a fundamental right.[10/] Rather, it depends upon the issue of whether a law firm has the right to use its own name - the same name it uses in other jurisdictions.

Since it relies upon television advertising, a right protected by the First Amendment, see Bates v. State Bar of Arizona, 433 U.S.

10/ Appellants do believe Justice Stevens' dissent in Leis v. Flynt, supra, is the better reasoned opinion than the majority.

350, 53 L.Ed. 2d 810, 97 S.Ct. 2691 (1977) and Columbia Broadcasting v. Democratic Comm., 412 U.S. 94, 36 L.Ed. 2d 772, 93 S.Ct. 2080 (1973), appellant should be able to use its own name in New Jersey. DR 2-102(C) does not prohibit appellant from operating in New Jersey. It just requires appellant to change its name.

Viewed in this light, it is clear that Leis v. Flynt, supra, is inapposite. At a minimum, there is a substantial question as to whether Leis v. Flynt, supra, supports New Jersey's rule against the use of appellant's name in New Jersey.

CONCLUSION

For these reasons, this Court should note probable jurisdiction of this appeal.

Respectfully submitted,

ROGER JON DIAMOND
Attorney for Appellant

Appendix A

ADVISORY COMMITTEE ON PROFESSIONAL ETHICS

Appointed by the Supreme Court of New Jersey

Opinion 475
Interstate Firm Name
Used in Local Office

The inquirer acting as counsel to a law firm which is doing business in several other jurisdictions under its firm name which we shall call "X & Y," inquires whether the firm may properly establish a law office or offices in New Jersey under the name "X & Y." In the brief submitted in support of the inquiry, our atten-

tion is correctly called to the provisions of DR 2-102(C) which reads as follows:

> "A lawyer shall not hold himself out as having a partnership with one or more lawyers unless they are in fact partners. A partnership shall not be formed or continued between or among lawyers licensed in different jurisdictions unless all enumerations of the members and associates of the firm on its letterhead and in other permissible listings make clear the jurisdictional limitations on those members and associates of the firm not licensed to practice in all listed jurisdictions; provided, however, a firm name may not be used in New Jersey unless all those named are or were members of the bar in New Jersey. (Emphasis added).

The language of the rule is clear. This Committee is not at liberty to disregard its plain language and refers the inquirer to Rule 1:14, observing that only the Supreme Court has the power to amend or otherwise modify the Disciplinary Rules.

* * * * * * * * *

Appendix B

SUPREME COURT OF NEW JERSEY
A-82 September Term 1981

ON PETITION FOR REVIEW OF OPINION 475 OF THE ADVISORY COMMITTEE ON PROFESSIONAL ETHICS AND DR 2-102(C)

Argued October 5, 1981 --
Decided April 28, 1982

On petition for review from the Advisory Committee on Professional Ethics.

Katherine J. Sweeney argued the cause for appellant Jacoby & Meyers (Sweeney, Bozonelis, Staehle & Woodward, attorneys).

Colette A. Coolbaugh, Secretary, argued the cause for respondent Advisory Committee on Professional Ethics (Ms. Coolbaugh, attorneys; Richard J. Engelhardt, Staff Attorney, on the brief).

Arthur Montano argued the cause for intervenor New Jersey State Bar Association (Montano, Summers, Mullen & Manuel, attorneys; Mr. Montano and Alan P. Bruce, on the brief).

A brief was submitted on behalf of amicus curiae Robert B. Zagoria, Pro Se.

The opinion of the Court was delivered by Pashman, J.

New Jersey law firms have always included only the names of New Jersey lawyers. That custom is now enforced by Disciplinary Rule 2-102(C), which forbids the use of law firm names "unless all those named are or were members of the bar in New Jersey." The purpose of the rule is obvious. It is reasonable to expect that those listed in a law firm name are licensed to practice in this State. If those persons are not so licensed, the firm name is deceptive to consumers of legal services. To the extent

law firm names with unlicensed lawyers defeat consumers' reasonable expectations, the disciplinary rule protects the public against deception.

Jacoby & Meyers, a law partnership with offices in California and New York, seeks review of an opinion of the Advisory Committee on Professional Ethics which prohibited it from opening a New Jersey office under the name "Jacoby & Meyers." Neither of petitioner's named partners is or has ever been a member of the New Jersey bar. Petitioner challenges the constitutionality of DR

2-102(C) and urges this Court to either revise the rule or to grant Jacoby & Meyers an exemption from the rule's coverage.

We find that DR 2-102(C) does not invade petitioner's constitutional rights. We therefore deny the relief requested and affirm the Advisory Committee's opinion. At the same time, we have concluded that the effects of the rule and its benefits should be studied further. Our traditional method of rule evaluation is by reference to Supreme Court Committee, report and recommendation by that committee, and finally, a decision by this

Court. We will follow that procedure in this case.

Moreover, to permit a full evaluation of DR 2-102(C), we have decided that our ban on television advertising in DR 2-101(D) should also be reconsidered. Jacoby & Meyers uses television advertising in New York that reaches consumers of legal services in this State. Allowing Jacoby & Meyers to affiliate with a New Jersey firm and advertise its name here while using television in New York would give its New Jersey affiliates an unfair advantage compared to other New Jersey firms. That unfair advantage would exist

even if Jacoby & Meyers did not advertise the fact of its New Jersey affiliation on television, and even if the New Jersey firm used only advertising which our rules permit.

Therefore, after the release of this opinion, the Court will refer both rules to a special Supreme Court Committee for its report and recommendations. Given the importance of the matter being considered, we will ask that Committee to subject these issues to intensive study. This will include hearings where all points of view may be expressed. We will

ask the Committee to report by January 1, 1983, if possible. We express no view on the merits of this reevaluation.

The Court's responsibility in regulation of the state bar is fundamental. We have plenary and exclusive control over both admission to the bar and the practice of law. We seek to exercise that control in the interests of the public. In a rapidly changing world, we should be careful to remain responsive to the public's needs. However, it would be wrong to alter existing rules, and the legitimate expectations they create, without an understanding of

what effects the changes may have. We therefore need a thorough review and study.

Finding no constitutional infirmity in DR 2-102(C), we deny the reflief requested by petitioner and affirm the Advisory Committee's opinion.

In 1972, Leonard Jacoby & Stephen Meyers, members of the California bar, formed a profit-making law firm to serve a large middle-class clientele with basic, standardized legal services. Beginning in California, the firm expanded considerably during the 1970's using media advertising and operating out of many neighbor-

hood law offices staffed by local attorneys. In 1979, the firm opened neighborhood offices in New York under its California name, Jacoby & Meyers. A third partner, licensed to practice law in New York, oversees its operations there. Jacoby & Meyers currently has 75 offices. The firm states that it interviews over 500 clients per day, accepting about 600 new matters each week.

Petitioner has indicated its desire to open a New Jersey office. On September 10, 1980, Jacoby & Meyers requested an opinion from this Court's Advisory Committee on

Professional Ethics on whether DR 2-102(C) allowed the use of its name in connection with its anticipated practice here. The Committee decided in N.J. Advisory Comm. on Professional Ethics, No. 475, 107 N.J.L.J. 283 (Apr 2, 1981) (Ethics Opinion 475), that the plain language of DR 2-102(C) forbade the use of Jacoby & Meyers as a New Jersey law firm name because neither Leonard Jacoby nor Stephen Meyers had ever been licensed to practice law in New Jersey. On April 3, 1981, Jacoby & Meyers petitioned this Court for review of

the Advisory Committee opinion, pursuant to R.1:19-8.1/

II

The initial question is whether Jacoby & Meyers has "standing" under R.1:19 to petition this Court for review of the Advisory Committee decision. Petitions for Supreme Court review can be filed by "any aggrieved member of the bar, bar association or ethics committee," R.1:19-8. NJSBA concedes that the words "member of

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1. After granting the petition, we permitted the New Jersey State Bar Association (NJSBA) to intervene in support of the disciplinary rule. _____N.J._____ (1981).

the bar" do not clearly exclude lawyers from other states, but correctly notes that R.1:19-8 must be read in conjunction with R.1:19-2, which defines the Advisory Committee's original jurisdiction. The latter rule allows the Committee to accept inquiries "only from the state bar association, from any county or local bar association, or from any member of the New Jersey bar." R.1:19-2. Strict application of the Committee's jurisdictional limitations would compel us to dismiss the petition for review and vacate Ethics Opinion 475.

In view of the public importance of this matter, we choose not to take such a course. This Court has inherent power under R.1:1-2 to relax any rule to prevent injustice. Granting petitioner's request for review is consistent with the intention of R.1:19-8, if not its language. The Court adopted R.1:19-8 contemporaneously with its decision in Higgins v. Advisory Comm. on Professional Ethics, 73 N.J. 123 (1977), which noted that no mechanism existed for appealing Committee decisions. The Court explained that "[u]nder the rule, any proper person in interest, on notice, may

petition this Court for review of an Advisory Committee opinion." 73 N.J. at 127 (emphasis added). As a law firm actively seeking to open offices in this State, Jacoby & Meyers is clearly a "proper person in interest." Denying the petition for review on jurisdictional grounds would not be consistent with "fairness in administration and the elimination of unjustifiable expense and delay." R.1:1-2. Petitioner raises important constitutional questions concerning a rule prohibiting out-of-state attorneys seeking to use their firm names in New Jersey. Petitioner's

stake in the outcome is clear and the issues presented are sufficiently defined for our resolution.

The Advisory Committee ruled in Opinion 475 on petitioner's inquiry despite the wording R.1:19-2 which excludes Messrs. Jacoby & Meyers from its original jurisdiction. The committee's action was appropriate under the circumstances. Likewise, pursuant to R.1:1-2 this Court will relax the jurisdictional requirements of R.1:19-8 to hear petitioner's claim, because strict application of the rule would both needlessly delay the resolution of an important

issue and "result in an injustice." R.1:1-2.

III

At the outset, we hold that the Advisory Committee correctly applied DR 2-102(C) to the petition of Jacoby & Meyers. There is no question that the use in New Jersey of the firm name Jacoby & Meyers would violate our Code of Professional Ethics.

Disciplinary Rule 2-102(C) provides that

> A lawyer or a professional corporation shall not hold himself or itself out as having a partnership with one or

> more lawyers or professional corporations unless they are in fact partners. A partnership shall not be formed or continued between or among lawyers licensed in different jurisdictions unless all enumerations of the members and associates of the firm on its letterhead and in other permissible listings make clear the jurisdictional limitations on those members and associates of the firm not licensed to practice in all listed jurisdictions; provided, however, a firm name may not be used in New Jersey unless all those named are or were members of the bar in New Jersey. [Emphasis added].

This disciplinary rule clearly prevents petitioner from using its name in New Jersey. Leonard Jacoby and Stephen Meyers have never been

licensed to practice law in this State. The Code provision could not be more explicit in banning the use of their names in a New Jersey law firm. The Committee, limited as it must be to interpretation of the Code of Professional Ethics, correctly applied the existing disciplinary rule.

IV

We now address petitioner's contentions that the provisions in DR 2-102(C) barring use of the firm name Jacoby & Meyers unconstitutionally infringes upon the firm's First Amendment rights and violates

the Commerce, Privileges and Immunities, and Equal Protection Clauses of the United States Constitution.

A. First Amendment

Petitioner argues that the firm name restriction in DR-102(C) violates the First Amendment. Jacoby & Meyers concedes that the use of a law firm name is a form of commercial speech and nothing more.2/ We are therefore asked to determine whether this Rule

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2. In Friedman v. Rogers 440 U.S. 1 (1979), the United States Supreme Court found that use of a trade name in connection with optometrical practice involved speech that was entirely commercial. (cont.)

deprives petitioner of its right to engage in commercial expression.

In the past decade, the United States Supreme Court has repudiated

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2. (cont.)

[T]he optometrist who uses a trade name "does not wish to editorialize on any subject, cultural, philosophical, or political. He does not wish to report any particularly newsworthy fact, or to make generalized observations even about commercial matters." His purpose is strictly business. The use of trade names in connection with optometrical practice, then, is a form of commercial speech and nothing more.

[440 U.S. at 11, quoting Virginia Pharmacy v. Va. Citizens Consumer Council, 425 U.S. 748, 761 (1976) (footnote and citations omitted)].

The name of a law firm is clearly a trade name as contemplated by the Supreme Court in Friedman.

the notion that commercial speech does not warrant constitutional protection. The landmark case of Virginia Pharmacy v. Va. Citizens Consumer Council, 425 U.S. 748 (1976), held that a state could not prohibit all advertising by pharmacists of the prices of prescription drugs. The Court stated that, just as commercial speech "is indispensable to the proper allocation of resources in a free enterprise system, it is also indispensable to the formation of intelligent opinions as to how that system ought to be regulated or altered." 425 U.S. at 765. In Bates v. State Bar of Arizona, 433 U.S. 350

(1976), the Court extended the reasoning of Virginia Pharmacy to protect the advertising of prices of routine legal services.

However, the Supreme Court has never equated commercial speech with political expression. Our society values political expression as an inherent part of the democratic process. Commercial speech, in contrast, is valued and constitutionally protected only to the extent that it conveys facts which facilitate honest commercial transactions. With that in mind, both the U.S. Supreme Court and this Court have said "there can be no constitutional objection to the

suppression of commercial messages . . . more likely to deceive the public than inform it." In re Professional Ethics Opinion 447, 86 N.J. 473, 477 (1981), quoting Central Hudson Gas v. Public Service Comm'n, 447 U.S. 557, ____ (1980). Moreover, "a different degree of protection is necessary to insure that the flow of the truthful and legitimate commercial information is unimpaired." Virginia Pharmacy, 425 U.S. at 771, n.24.

Because commercial speech concerning the nature or price of goods and services is more objective than other speech, it burdens the

speaker less to require its truthfulness. At the same time, commercial speech is perhaps more likely to be taken as objectively true, and therefore may more easily deceive the listener when false. The obvious importance of commercial speech in generating business profits insures that its proper regulation will not unduly inhibit the full flow of business information which the speaker seeks to convey. Id. at 775-81 (Stewart, J. concurring). While restraints on other forms of speech may chill expression and development of political and other ideas, regulation

of commercial speech serves primarily to promote honesty and fair dealing in the marketplace.

Not all commercial speech receives identical constitutional protection. In Friedman v. Rogers, supra, the Supreme Court drew a distinction between different types of commercial speech which bears directly on petitioner's claim. The Court explicitly distinguished the objective and easily verifiable price information at issue in Virginia Pharmacy and Bates from the more potentially misleading information conveyed through use of a trade name. The Court noted

that while Virginia Pharmacy and Bates involved speech that was self-explanatory, a trade name is

> a form of commercial speech that has no intrinsic meaning. A trade name conveys no information about the price and nature of the services offered by an optometrist until it acquires meaning over a period of time by associations formed in the minds of the public between the name and some standard of price or quality. Because these ill-defined associations of trade names with price and quality information can be manipulated by the users of trade names, there is a significant possibility that trade names will be used to mislead the public.
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> [440 U.S. at 12-13 (footnote omitted)]

The Supreme Court noted in Friedman that the use of trade names has some potential communicative value, but also poses numerous "possibilities for deception." Id. at 13. Balancing the value of trade names against their potential to mislead, the Court upheld a prohibition on the use of trade names by optometrists.3/

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3. That a trade name contains no explicit falsehood did not prevent the Court from barring its use.

> "Obviously, much commercial speech is not provably false, or even wholly false, but only deceptive or misleading. We foresee no obstacle to a State's dealing effectively with this problem."

(cont.)

It is precisely the potential for misleading the public through "ill-defined associations" inherent in trade names which Disciplinary Rule 2-102(C) seeks to address and which use of the firm name Jacoby & Meyers might engender. The potential to mislead arises from the belief that those who appear in a law firm's name are practicing New Jersey attorneys. In fact, neither named partner is licensed

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3. (cont.)

[440 U.S. at 9-10, quoting Virginia Pharmacy, supra, 425 U.S. at 771.]

to practice here. Use of the name Jacoby & Meyers may therefore lead prospective clients to believe that they are dealing with a firm headed by New Jersey attorneys when in fact they are not.4/

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4. There is no evidence to the contrary in this record. The universalpractice throughout the history of the legal profession in this State, as far as we know, has been to include only New Jersey attorneys in firm names. This itself is persuasive evidence of the recognized potential for such deception.

Of course, prospective clients often inquire about a firm before retaining it. Presumably such inquiry, along with some general knowledge about Jacoby & Meyers, would lead many to the realization (cont.)

As we have often noted, there is nothing more important to our system of justice than public confidence in the bench and bar. Whether the attorneys in a firm are licensed to practice law in this state is information of the utmost importance to prospective clients. Cf. In the Matter of R.M.J., 50 U.S.L.W. 4185, 4189 (Jan. 25, 1982) (listing the states in which a

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4. (cont.)

that the named partners are not New Jersey attorneys. Other prospective clients, however, may have less knowledge of the legal profession and may therefore anticipate that they will be getting the legal assistance of Messrs. Jacoby & Meyers themselves.

lawyer is licensed to practice is "factual and highly relevant."). A client who finds that the firm he has consulted is headed and controlled by lawyers not licensed -- and perhaps not even qualified -- to practice in New Jersey may justifiably lose confidence in the bar and the bench that permitted such deception. The danger that such deception would occur in the absence of Disciplinary Rule 2-102(C) is sufficient constitutional justification to restrict petitioner's commercial speech.

Our holding in this case is supported by the recent United States Supreme Court decision

involving commercial speech by lawyers, In the Matter of R.M.J., 50 U.S.L.W. 4185 (Jan. 15, 1982). While invalidating restrictions placed by Missouri on lawyers' advertising, the Supreme Court stressed that the Constitution permits prohibition of both inherently misleading advertising and advertising that experience has shown is subject to abuse. 50 U.S.L.W. at 4188-89. That is precisely the basis for the prohibition here. The use of a firm name in New Jersey that includes attorneys not admitted to our bar

is certain to deceive at least some consumers of legal services.5/

This inquiry does not end there, however. As the United States Supreme Court pointed out, "the remedy ... is not necessarily a prohibition but preferably a requirement of disclaimers or explanation," 50 U.S.L.W. at 4189.

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5. A state supreme court judge in New York recently denied a motion by Messrs. Jacoby and Meyers to dismiss an action charging them with misrepresenting themselves as attorneys licensed to practice in that state. The judge ruled that the complaint, filed by the N.Y. Criminal and Civil Courts Bar Association, stated a cause of action for violating the proscriptions on unauthorized practice in the state's Judiciary Law. N.Y. Law J., April 5, 1982, at 12.

Moreover, "restrictions upon such advertising may be no broader than reasonably necessary to prevent the deception." Id.

This "less restrictive alternative" approach immediately suggests the possibility that the use of a disclaimer such as "Jacoby & Meyers, not licensed in New Jersey" should be permitted. However, instead of diminishing the potential for deception, we believe such an explanation would create additional confusion. It might even imply to some prospective clients an official disapproval of Jacoby & Meyers' practice. We do not believe that the Constitution's

protection of commercial speech requires such risks, particularly since our interpretation of DR 2-102(C) allows New Jersey firms to affiliate with out-of-state firms and to advertise that affiliation, consistent with our rules on advertising. See infra at 18-22.

It might also be suggested that the deception inherent in the use of the firm name "Jacoby & Meyers" would not exist but for our rule, and that the rule change itself would end the deception. The rule has reinforced the public expectation that those named in a New Jersey firm are licensed to practice in this State.

Undoubtedly a rule change would diminish that expectation over time and therefore reduce the possibility of deception. However, we see no constitutional requirement to abolish DR 2-102(C) and thereby risk such deception, since firms with named out-of-state lawyers have alternative means of advertising that are neither deceptive nor confusing, see infra at 18-22.

There is a further constitutional justification of the continuation of the prohibition contained in the rule. Under our rules, law firm names are "official" designations, and therefore are regulated more carefully than

ordinary advertising. See In re Opinion 447, supra. A firm name, like an attorney's license, letterhead or business card, services to identify the firm or association of attorneys as persons authorized to practice law in this jurisdiction. Id. Where, as here, the State seeks simply to ensure that the official status of an attorney as one licensed to practice in New Jersey is conveyed with accuracy and clarity, there can be no doubt about the validity of a rule proscribing deceptive law firm names. For this reason as well, we conclude that DR 2-102(C)

is a valid regulation of commercial speech.

In concluding that the First Amendment does not protect the use of the firm name "Jacoby & Meyers" in New Jersey, we note that this restriction does not hamper the ability of that firm, or any New Jersey firm with which it may be associated, to advertise the association. New Jersey firms are not prohibited from associating with out-of-state law firms or from advertising that association as long as there is no deception involved. We recognize that the legal professional has changed dramatically over the last decade,

with legal advertising now permitted and the practice of law becoming increasingly interstate in scope. Our rules are flexible enough, despite the firm name restriction involved in this case, to accommodate the needs of multi-jurisdictional firms. Lawyers in New Jersey affiliated with such a firm will be able to signify in an appropriate manner their affiliation on letterheads, professional cards and office signs, so long as they make clear that the out-of-state firm is not licensed to practice in New Jersey. Similarly, the multi-jurisdictional firm will be free to advertise its association with a

New Jersey affiliate, consistent with this State's rules on lawyer advertising.

This Court recognizes, however, that television advertising by New Jersey lawyers is banned, while New York attorneys have been permitted to advertise on the broadcast media. Jacoby & Meyers has legally used television ads in New York which are regularly beamed to New Jersey on interstate channels. The extent and intensity of such advertising is not in the record, and we have no way of knowing how substantial or influential it is. We do know that if petitioner were allowed to use its

firm name in New Jersey in any form its television advertising could give it a substantial competitive advantage.

We do not pass here on the wisdom of our ban on television advertising. Advertising by lawyers is a very recent development. Its control, abuses, advantages and disadvantages will take many years to fully appreciate. While fears may prove to be unfounded, concerns about advertising are heightened where television is the medium. This concern is underscored by the United States Supreme Court's recognition in Bates, supra, that "the special problems

of advertising on the electronic broadcast media will warrant special consideration." 433 U.S. at 384, 53 L.Ed. at 836.

For the present, however, the ban exists. It has been imposed in good faith and applies to all New Jersey Lawyers. Any New Jersey law firm that advertised in print its association with petitioner is likely to gain a real benefit from petitioner's television advertising. This would produce an unfair advantage over other firms in New Jersey who comply with the rule. We would, in effect, have drawn an exception to our television ban in favor of petitioner and its New

Jersey affiliates. The Court finds no conceivable justification for such an exception. Indeed we would deem it grossly unfair. We therefore hold that our ban on television advertising, DR 2-101(D), prevents New Jersey attorneys and New Jersey firms from advertising or allowing the advertising of their association with petitioner in any way, as long as petitioner continues television advertising which reaches New Jersey consumers.6/

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6. It makes little sense to reserve this question as the dissent would have us do. Assuming that Jacoby & Meyers is serious about coming into New Jersey, the (cont.)

Our restriction on the use of out-of-state firm names which are not televised in New Jersey is highly limited, the limitation reflecting only the

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6. (cont.)

issue will inevitably arise. Rather than leave petitioner uncertain about the terms on which it can associate with a New Jersey firm, thereby engendering further litigation, judicial economy suggests resolution of the issue here.

Further, the factual underpinning of our position -- that the New Jersey affiliate will benefit from advertising by Jacoby & Meyers in New York -- is far more certain than the dissent suggests. Concededly, the extent of the advantage is not established, but it belies reality to argue that the name recognition that would result from television advertising is of no value.

State's legitimate interest in preventing potential deception. The rule imposing that limited restriction, DR 2-102(C), does not violate the First Amendment. That the use of petitioner's name may be more severely restricted is not the result of the challenged rule, but rather of our ban on television advertising, which is not challenged in this appeal. If petitioner's television advertising terminates, it will stand on the same footing as any other out-of-state firm.

B. Commerce Clause

Petitioner argues next that DR 2-102(C) violates the Commerce

Clause 7/ by requiring out-of-state law firms to change their names before establishing offices within New Jersey when their named partners are not licensed to practice here. Petitioner contends that the rule's restriction on law firm names unduly burdens interstate commerce in legal services.

Under the Commerce Clause, the "crucial inquiry" is whether the law is "basically a protectionist measure, or whether it can fairly be viewed as a law directed to legitimate local concerns, with

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7. U.S. Constituion, Art. I, Section 8, cl. 3.

effects upon interestate commerce that are only incidental." Philadelphia v. N.J., 437 U.S. 617 (1978).

Measures whose only purpose is economic protection of local interests are virtually per se invalid. See Philadelphia v. New Jersey, supra. However, it is well established that a state may, in the exercise of its police power, lawfully enact legislation affecting interstate commerce, provided that the federal government has not preempted the field. Such state regulation is limited only to the extent that it discriminates against interstate commerce.

See Philadelphia v. N.J., 437 U.S. at 626-27. In this case, there is no such discrimination. The rule applies equally to all persons, resident and nonresident, who are not members of the New Jersey bar. In the absence of such discrimination, there can be no violation of the interstate commerce clause. See Huron Portland Cement Co. v. Detroit, 362 U.S. 440 (1960).

Even if the state regulation is directed against interstate commerce, it may be upheld if it satisfies a two-part balancing test. Applying that test, the courts will uphold regulations whenever (1) they are rationally

related to legitimate state concerns, and (2) the resulting discrimination is outweighed by the state interest in enforcing the regulation. See Pike v. Bruce Church, Inc., 397 U.S. 137 (1970); Southern Pacific Co. v. Arizona, 325 U.S. 761 (1944).

We need not belabor the State's legitimate interest in regulating its Bar through the enforcement of DR 2-102(C). The rule is not a "protectionist" measure, but rather a measure rationally related to the legitimate state concern of preventing deception. State legislation designed to prevent deception has

long been recognized as valid, despite its incidental effects on interstate commerce. See Pike v. Bruce Church, supra, 325 U.S. at 143; Sligh v. Kirkwood, 237 U.S. 52, 61 (1915). There is no constitutional obstacle to the State's prohibition of deceptive or misleading commercial speech. Friedman, supra, Virginia Pharmacy, supra. And "[t]he interest of the States in regulating lawyers is especially great since lawyers are essential to the primary governmental function of administering justice, and have historically been 'officers of the courts.'" Goldfarb v. Virginia State Bar, 421

U.S. 773, 792 (1975) (citations omitted).

The State's paramount interest in preventing deception in the practice of law overrides any incidental effect the rule may have on interstate commerce. While the Supreme Court recognized in Goldfarb that legal services are "commerce" for purposes of the Sherman Act, 15 U.S.C. Section 1, et seq., the Court was careful to emphasize that "we intend no diminution of the authority of the State to regulate its professions." 421 U.S. at 793. Obviously, the entire regulatory scheme for any profession affects interstate

commerce in that profession's services. But "the Constituion does not require that because a lawyer has been admitted to the bar of one State, he or she must be allowed to practice in another." Leis v. Flynt, 439 U.S. 438, 443 (1979). Even Bar rules which burden interstate legal practice substantially more than the disciplinary rule at issue here do not violate the Commerce Clause. See Wilson v. Wilson, 416 F.Supp. 984 (D.Or. 1976), aff'd mem., 430 U.S. 925, 51 L.Ed. 2d 768 (1977) (upholding a bar rule requiring Oregon bar applicants to declare their intention to be Oregon residents at

the time of admission); Aronson v. Ambrose, 366 F.Supp. 37 (DVI 1972), aff'd, 479 F.2d 75 (3rd Cir.), cert. den., 414 U.S. 854 (1973) (upholding a rule requiring all Virgin Island attorneys to be domiciled there).

The Commerce Clause thus does not prevent the application of DR 2-102(C) to petitioner. The rule presents little burden on interstate commerce, and any burden is wholly incidental to valid regulation of the State bar. It allows licensed non-resident attorneys to practice law in this State and to use their names here. The rule treats licensed non-

resident attorneys precisely the same as licensed resident attorneys. Only those non-resident attorneys not licensed to practice law in New Jersey face any burden under DR 2-102(C). Even these lawyers can form multi-jurisdictional partnerships that operate in this State, and can advertise their affiliation with licensed New Jersey attorneys. The rule's sole burden upon interstate commerce is that attorneys not licensed to practice here may not use their names in the name of a New Jersey law firm. Because the State's interest in protecting the public from deception clearly justifies this inci-

dental restraint on interstate commerce in legal services, there is no Commerce Clause violation.

We note as a matter of information, in addition to the absence of any residency requirement in New Jersey, that we are the only state which permitted admission to the bar on the basis of an MBE test score alone, where the test was taken in another State.8/

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8. That practice no longer obtains, since we recently revised our rules of admission, both for residents and non-residents, to require satisfactory performance on both the MBE test and in an essay. The MBE test, however, may still be satisfied by being passed when administered out-of-state.

C. Privileges and Immunities Clause

The Privileges and Immunities Clause[9/] insures that non-residents and residents receive equal treatment with respect to "fundamental" activities whose restriction would "hinder the formation, the purpose, or the development of a single union." Baldwin v. Montana Fish & Game Comm'n, 436 U.S. 371 (1978). Salorio v. Glaser, 82 N.J. 482, cert. den. 449 U.S. 804, 66 L.Ed.2d 7 (1980). Petitoner argues, without direct support, that the right to use its

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9. U.S. Constitution, Art. IV, Section 2, cl. 1.

firm name in New Jersey is a "fundamental" privilege guaranteed by the Privileges and Immunities Clause.

The Supreme Court has never declared the practice of law to be a "fundamental" privilege under the clause, and nothing suggests it would now do so. To the contrary, as the Court noted in Leis v. Flynt, supra, several times in the last decade it has sustained state bar rules that excluded out-of-state counsel from practice

altogether or on a case-by-case basis. 439 U.S. at 443.[10/]

Moreover, as stated above, DR 2-102(C) only incidentally affects out-of-state attorneys.

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10. Some state courts have used the Privileges and Immunities Clause to invalidate bar requirements that effectively precluded non-residents from practicing law. See Gordon v. Comm'n on Character and Fitness, 48 N.Y.2d 266, 397 N.E.2d 1309, 422 N.Y.S. 2d 641 (1979) (invalidating six-month residency requirement for bar admission); Sheley v. Alaska Bar Ass'n, 620 P.2d 640 (Alas. 1980) (invalidating 30-day requirement). In contrast to those requirements prohibiting any professional activity, however, DR 2-102(C) places only a limited restriction on attorneys practicing law in the State. Of crucial importance, that restriction makes absolutely no distinction based on residence and works no discrimination against licensed non-resident attorneys.

The rule treats licensed non-resident attorneys precisely the same as licensed resident attorneys. Non-resident attorneys have greater difficulty using their firm name in New Jersey only to the extent that they may face greater difficulty satisfying the requirements for being admitted to the Bar or continuing to practice here. Such requirements have been upheld by the Supreme Court, see Leis v. Flynt, supra; Wilson v. Wilson, supra, and are not at issue here. There is no serious contention that the right to use a specific law firm name is "fundamental" for

purposes of the Privileges and Immunities Clause.

The rule, therefore, does not offend the Privileges and Immunities Clause.

D. Equal Protection Clause

Petitioner advances a final constitutional claim that DR 2-102(C) offends Equal Protection "by unreasonably discriminating between classes of partnership names." Jacoby & Meyers argues that allowing the use of firm names containing deceased or retired partners while barring the use of firm names containing lawyers unlicensed in New Jersey

irrationally discriminates against attorneys in those latter firms.

Where state regulation neither infringes upon a fundamental right nor burdens a suspect class, the Supreme Court has upheld any legislative classification based upon facts that "reasonably can be conceived to constitute a distinction, or difference in state policy," Allied Stores v. Bowers, 358 U.S. 522, 530 (1959). In this case, petitioner points to a distinction created between lawyers in firms whose named partners are or were licensed to practice here and whose firm name therefore can be used, and lawyers such as

Messrs. Jacoby and Meyers who cannot use their firm name here. Certainly, lawyers who are not licensed to practice in New Jersey do not constitute a suspect class such as race, religion or alienage deserving of extraordinary protection under the Equal Protection Clause. See, e.g., United States v. Carolene Products Co., 304 U.S. 144, 152 n.4 (1938). Nor is the right to use one's law firm name of fundamental importance in our ordered scheme of liberties. Petitioner must therefore argue that the distinction implicit in DR 2-102(C) between names of deceased or retired partners and names of

persons never licensed to practice law here has no rational relation to the goal of protecting prospective consumers of legal services. See Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 66 L.Ed.2d 659 (1981).

The Court does not deny that use of a firm name containing deceased or retired partners has some potential for misleading consumers. Cf. Nevada Sup. Ct. R. 202 (prohibiting the use of a partner's name after three years following his death). However, the absence of an all-encompassing rule eradicating every possible species of misconception does not render

the existing protections invalid. "The State [is] not bound to deal alike with all *.*.* classes, or to strike at all evils at the same time or in the same way." Semler v. Oregon State Bd. of Dental Examiners, 294 U.S. 608, 610 (1935). "[R]eform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind." Williamson v. Lee Optical, 348 U.S. 483, 489 (1955).

There are significant distinctions between prohibiting the use of a firm name such as Jacoby & Meyers where neither named partner has ever been licensed to practice

in New Jersey and requiring that law firms change their names whenever a named partner dies. In the former case, the burden on the firm is minimal, for the reasons discussed above. By contrast, the burden entailed by a mandate that firms continually update their names would be substantial. Additionally, the death of a named partner may not substantially alter the firm's practice, and therefore should not necessitate a sacrifice in the name-recognition that the firm has built. Indeed, in many cases requiring a change of name upon the death of a named partner would cause unnecessary confusion

without preventing deception where the practice of the firm remains essentially unchanged.

For these reasons, the distinction attacked by petitioner is rational and therefore constitutionally permissible under the Equal Protection Clause.

V

Although we sustain DR 2-102(C) against petitioner's constitutional challenges, we reiterate that our opinion takes no position about the wisdom of retaining the rule. Nor do we express any opinion about the current ban on television advertising in DR 2-101(D), either in

conjunction with or without the restriction on use of law firm names in DR 2-102(C). We believe that the wisdom of these rules can best be tested by allowing a full hearing on all points of view and an in-depth investigation of the underlying interests.

In regulating the advertising of legal services, this Court has used great caution. We have done so because the constitution mandates that we regulate the practice of law, N.J. Const. (1947), Art. VI, Paragraph 2, Section 3, and because we firmly believe that the practice of law differs from other enterprises. The genuine capital

of lawyers does not lie in libraries of legal forms or arsenals of office equipment. It is the trust they have earned from their clients and the reputation they have developed with fellow practitioners, the courts and the community. It is the experience they have slowly accumulated by the repeated, successful exercise of judgment. This human capital is not acquired wholesale by adherence to a routinized practice. It is conveyed not by the grant of a franchise but by learning from others with experience. To the extent that an out-of-state law firm seeks to capitalize on a reputation not

based on the successful practice of New Jersey law, the potential for consumer deception will always be present.

However, we recognized that in an age of lawyer advertising, reputations will no longer develop exclusively by the word of satisfied clients. Both national firms and advertising in general provide potential benefits to New Jersey consumers of legal services. Whether the benefits of DR 2-102(C) and 2-101(D) continue to outweigh the rule's burdens is for the Supreme Court Committee and ultimately this Court to decide. In the meantime, however, we retain

our disciplinary rules and uphold the constitutionality of DR 2-102(C). The petition for review is granted, and Opinion 475 of the Advisory Committee on Professional Ethics is affirmed. Petitoner's request for alternative relief is denied.

Chief Justice Wilentz and Justices Clifford, Schreiber, Pollock and O'Hern join in this opinion. Justice Handler has filed a separate opinion concurring in part and dissenting in part.

SUPREME COURT OF NEW JERSEY
A-82 September Term 1981

ON PETITION FOR REVIEW OF OPINION 475 OF THE ADVISORY COMMITTEE ON PROFESSIONAL ETHICS AND DR 2-102(C)

HANDLER, J., concurring in part and dissenting in part.

I concur in the essential judgment of the Court that DR 2-102(C) prohibits the inclusion in a firm name of lawyers not authorized to practice law in this State and is constitutional. I subscribe to this determination because the Court also recognizes the right of New Jersey attorneys to affiliate with a national law firm and to advertise their association.

Hence, the firm name restriction is extremely narrow.

I do not believe, however, that the Court should deal with the question whether a national law firm such as Jacoby & Meyers or a local affiliate of that firm will be in violation of our State's ban on television and radio advertising if the local office lawfully advertises its affiliation through the conventional print media, while the national firm continues to advertise on out-of-state television without even mentioning its New Jersey affiliate. That question is premature, complex and controversial. While it is

entirely appropriate to note these issues, there is no need to resolve them in this case. By ruling on an interim basis that our State's ban on attorney broadcast advertising will apply to certain kinds of television advertising involving affiliated law firms, the Court may be thought to have turned a narrow firm name controversy into a TV advertising case with substantial constitutional and public policy implications. I am not prepared in this case to resolve even provisionally the issue of whether broadcast advertising is permissible. I therefore write separately to explain my views and

misgivings on this significant point.

It is important to keep a sharp focus on the real issue in this case. Petitioner Jacoby & Meyers, a national law firm with offices throughout California and New York, is considering opening several branches in New Jersey and wants to operate under its existing name of Jacoby & Meyers. However, our State's disciplinary rules prohibit the mention in the firm name of any lawyer not licensed to practice in New Jersey. DR 2-102(C). Neither Mr. Jacoby nor Mr. Meyers is licensed to practice in this state.

Petitioner initiated this action to challenge the constitutionality of our firm name rule. In today's decision the Court has rejected that challenge. I agree with the majority that DR 2-102(C) bars petitioner's use of its existing name as its firm name in New Jersey and, as narrowly construed and applied in our decision in this case, is unconstitutional. The firm name is not truly commercial expression or speech. Rather, it is a quasi-official designation which can be reasonably regulated by the State without encroaching upon protected

areas of commercial speech.1/ See ante at _____ (slip op. at 17-18). However, I have serious reservations about the wisdom and continued viability of our firm name restriction in this era of multi-jurisdictional practice and widespread legal advertising. I therefore welcome the majority's decision to refer this matter to a special Supreme Court committee for consideration of whether to change our present rule, as well as our State's total ban on broadcast advertising by attorneys.

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1. The majority further holds that "[t]he use of a firm name in New Jersey that includes attorneys (cont.)

The majority further states that our firm name restrictions presents no barrier to a New Jersey law office advertising its

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1. (cont.)

not admitted to our bar is certain to deceive at least some consumers of legal services." See ante at _____ (slip op. at 15). On an abstract level, that may be so, but I seriously question the pertinency of that proposition. Any potential deception can be dissipated by a simple rule change. I see nothing inherently deceptive about the practice of using a firm name which includes out-of-state lawyers. Certainly, were we to change our rule to permit nonlicensed attorneys to be included in a firm name, we would not be authorizing a deceptive practice. The vast majority of jurisdictions now allow the firm name to follow the firm. In fact, New Jersey is one of only two states which have retained this firm name restriction.

affiliation with a national law firm. The New Jersey branch of the firm may note such an association on office signs, professional cards and letterheads, as long as the reference is not misleading. See ante at _____ (slip op. at 19). It may also utilize all currently permissible forms of commercial advertising. See ante at _____ (slip op. at 18-19). As far as I am concerned, recognition of the right to advertise affiliation draws the sting from the firm name restriction and constitutes the only basis for its acceptability.

I do not believe the Court is required to confront more than the

foregoing propositions. Nevertheless, the Court has felt constrained to address television advertising, which is prohibited under our disciplinary rules. DR 2-102(D) ("A paid advertisement . . . shall be communicated to the public only in print media"). The majority expresses its understandable concern over the fact that Jacoby & Meyers relies heavily on broadcast media advertising and maintains offices in New York, where there is no ban on television and radio advertising by lawyers. It should suffice on this aspect of the case simply to note this fact and the potential conflict which

may arise from attempted uses of broadcast advertising by Jacoby & Meyers regarding a New Jersey law firm affiliate.

The Court, for purposes of this case, states that "if petitioner were allowed to use its firm name in New Jersey in any form its television advertising [in New York] could give it a substantial competitive advantage [over New Jersey firms]." See ante at _____ (slip op. at 19). According to the majority: "Any New Jersey law firm that advertised in print its association with petitioner is likely to gain a real benefit from petitioner's

television advertising." Ante at _____ (slip op. at 20). In my view, the record in this case is too slim to resolve the fact-sensitive question of whether Jacoby & Meyers' New York television advertising would constitute a direct benefit and unfair trade advantage for itself or its New Jersey branches, at least where the advertising does not mention the name of the firm's New Jersey affiliate. It seems a very debatable proposition that a measurable benefit in New Jersey will accrue to petitioner or its local affiliate if the New Jersey law firm

is never mentioned in the New York ads.[2]/

Of greater concern than the Court's expressed belief that Jacoby & Meyers's New Jersey affiliate would reap an unfair trade advantage from advertising practices in New York is the cast which its discussion could place on future cases or proceedings which may be more appropriate for determining the permissible scope of

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2. Even the majority has admitted that the extent and intensity of petitioner's New York television advertising is not a matter of record in this case and that the Court has no way of measuring the influence or effect of such advertising. See ante at _____ (slip op. at 19).

attorney broadcast advertising. The majority forewarns Jacoby & Meyers that if it intends to continue running television commercials in New York, it must forego advertising its affiliation with New Jersey firms not only in the broadcast but also in the print media. It serves a similar warning upon any New Jersey firm affiliating with petitioner.

This in futuro disposition by the Court necessarily involves speculation on distant problems which are not ripe for a reasoned resolution. Cf. Clay v. Sun Ins. Office Limited, 363 U.S. 207, 221, 80 S.Ct. 1222, _____, 4 L.Ed.2d

1170, 1175 (1960) (Frankfurter, J.) ("[W]e do not remotely hint to an answer to a question that is prematurely put"). Furthermore, in discussing the question of permissible television advertising, the majority addresses an issue with significant constitutional and public policy implications. Such matters should be kept at arms length until their proximity to the heart of the controversy makes hand-to-hand combat with them unavoidable. Cf. Donadio v. Cunningham, 58 N.J. 309, 325-326 (1971) ("a court should not reach and determine a constitutional issue unless absolutely imperative

in the disposition of the litigation"). See, e.g., Ahto v. Weaver, 39 N.J. 418, 428 (1963); Lordi v. UA New Jersey Theaters, Inc., 108 N.J. Super. 19, 33 (Ch. Div. 1969).

Despite my reservations, I am somewhat mollified because the Court's decision is intended to be temporary. It is made in the context of a potential change in our rules governing this entire subject. Were this not a provisional ruling, our decision might place us on a collision course with the principles enunciated in the United States Supreme Court's latest decision on the scope of

legal advertising. See In the Matter of R.M.J., 50 U.S.L.W. 4185 (Jan. 25, 1982). In that decision Justice Powell, writing for a unanimous Court, underscored the point that regulations restricting the right of attorneys to advertise are valid only "where the record indicates that a particular form or method of advertising has in fact been deceptive." Id. at 4188. Justice Powell further explained that the scope of any such restriction must be "no broader than reasonably necessary to prevent the deception." Id. at 4189.

This Court is mindful of the great changes which have occurred in the practice of law throughout the country. It is fully aware of the direction which the Supreme Court is taking on attorney advertising. I am confident that we will navigate within the constitutional markers set by the Supreme Court. Such a course would acknowledge that there is nothing inherently deceptive or misleading about television and radio advertising.3/ Moreover, it would

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3. The majority refers to the landmark case of Bates v. State Bar of Arizona, 433 U.S. 350, 97 S.Ct. 2691, 53 L.Ed.2d 810 (1977), wherein the Supreme Court first (cont.)

recognize that a blanket prohibition against such advertising may sweep more broadly than necessary

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3. (cont.)

declared that lawyers have the constitutional right to advertise their services. See ante at _____ (slip op. at 20). In that case, the Court stated in regard to television and radio advertising: "[T]he special problems of advertising on the electronic broadcast media will warrant special consideration." 433 U.S. at 384, 97 S.Ct. at 2709, 53 L.Ed.2d at 836. I agree that television and radio advertising warrant our special concern because those media provide the speaker with a unique opportunity to reach a widespread audience with relative ease. Nevertheless, in my mind, that concern alone may not constitute sufficient justification for a total ban on television and radio advertising by lawyers.

to effectuate the State's legitimate ends.4/

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4. Of course, the State may place reasonable time, place and manner restrictions on attorney advertising. See Bates; In re Ethics Opinion 447, 86 N.J. 473 (1981). However, the mere fact that DR 2-101(D) restricts only the manner of advertising, rather than its content, does not mean the State's regulation may sweep more broadly than necessary in restricting the manner of advertising. See, e.g., In the Matter of R.M.J., 50 U.S.L.W. 4185 (U.S. Jan. 25, 1982) (rule prohibitng attorneys from mailing announcement cards to persons other than lawyers, former clients, relatives or friends held unconstitutional); Koffler v. Joint Bar Association, 51 N.Y. 127, 412 N.E.2d 927, 432 N.Y.S.2d 872 (1980) (attorney mass mailings to real estate owners and brokers found constitutionally protected); In re Appert, 315 N.W.2d 204 (Minn. Sup. Ct. 1981) (lawyer advertising through distribution of brochures and letters protected under First Amendment).

(cont.)

In the wake of the R.M.J. decision, questions have surfaced not only as to the continued constitutional validity of our

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4. (cont.)

Moreover, by prohibiting lawyers from advertising on television and radio, it can certainly be argued that New Jersey has denied attorneys access to the most effective means of commercial advertising. As the Supreme Court has noted in the context of political speech: "[The public's] increasing dependence on television, radio and other mass media for news and information has made these expensive modes of communication indispensible instruments of effective . . . speech." Buckley v. Valeo, 424 U.S. 1, 19, 96 S.Ct. 612, 635, 46 L.Ed.2d 659, 688 (1976). See generally Mastro, Costlow and Sanchez, "Taking the Initiative: Corporate Control of the Referendum Process Through Mass Media Spending and What to Do About It," 32 Fed. Comm. L.J. 315 (1980).

State's total ban on television and radio advertising by lawyers but also as to its desirability as a matter of policy. At least 39 other states, plus the District of Columbia, now allow attorneys to advertise on television or radio in some form. See Andrews, "Lawyer Advertising and the First Amendment," 1981 Am. B. Foundation Research J. 967, 1014-1015; "Lawyer Takes to T.V.," 109 N.J.L.J. 183 (1982). In addition, the new ABA Model Rules of Professional Conduct provide that lawyers may advertise their services through public media, including radio and television. See Rule 7.2(a), ABA Model

Rules of Professional Conduct (Alt. Draft 1981). Thus, DR 2-101(D) may be constitutionally vulnerable; it may not comport with current public policy; and, assuredly, it is ripe for reconsideration.

I recognize the majority's sincere conviction that something be said about the rule's present application. However, I have a lingering concern about the effect of this ruling on petitioner's otherwise permissible advertising practices. As already mentioned, a New Jersey firm may freely advertise its association with a national law firm, as long as that advertising is not deceptive or

misleading. See ante at _____ (slip op. at 19). Nevertheless, the Court rules today that such nonmisleading advertising can be banned simply because the national law firm simultaneously exercises television advertising rights allowed it in another state, even though that advertising makes no reference to the firm's New Jersey affiliate. This ruling tends to contradict the Court's basic rationale for sustaining the firm name restriction -- that New Jersey lawyers can fully advertise their associations with national firms. However, I do not surmise that, even in the immediate future while

our rules are being studied anew, this Court will prohibit reasonable, nondeceptive advertising or deny lawyers the right to contest any adverse restrictions placed upon permissible advertising efforts.

I would see no need to comment on the subject of attorney television advertising in this case were it not for the Court injecting the issue into its decision. I would much prefer to be able to consider these problems either in a more appropriate case raising these issues on an adequate record or in a rulemaking proceeding which seeks

the formulation of an appropriate regulation.

To the extent the majority's decision may be thought to be an imprimatur on our current strictures against television advertising, I merely want to state that I do not think this is so and to suggest that our rules may not be deserving of a vigorous defense.5/ The Court itself recognizes that we may be out of step

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5. As a recent editorial in the New Jersey Law Journal noted:

> [I]t is clear that purely dignitary limitations can no longer be imposed upon lawyer advertising. The freedom that attaches to other, like-situated (cont.)

with the times and should consider bringing our attorney advertising rules into conformity with the rest of the country. See "Living Up to the First Amendment," 109 N.J.L.J. 204 (1982); Andrews, supra, 1981 Am. Foundation Research J. at 1020-1021. I fully expect the special committee entrusted with the task of reviewing this

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5. (cont.)

> commercial speakers now attaches to members of the bar. Perhaps that is exactly as it should be. We are, after all, a nation that stakes its best hopes on untrammeled expression.
>
> ["Living Up to the First Amendment," 109 N.J.L.J. 204 (1982)]

subject matter -- and then this Court in due time and with an adequate record -- to propose and adopt rules which are constitutional and solicitous of the public and the profession. I would therefore await a more suitable case or proceeding than this one for determining the right of attorneys to advertise on television and radio.

SYLLABUS

(This syllabus is not part of the opinion of the Court. It has been prepared by the Office of the Clerk for the convenience of the reader. It has been neither reviewed nor approved by the Supreme Court. Please note that, in the interests of brevity, portions of any opinion may not have been summarized.)

ON PETITION FOR REVIEW OF
OPINION 475
OF THE ADVISORY COMMITTEE

ON PROFESSIONAL ETHICS AND
DR 2-101(C) (A-82)

Argued October 5, 1982 --
Decided April 28, 1982

PASHMAN, J., writing for a majority of the Court.

Disciplinary Rule 2-102(C) requires that the name of any New Jersey law firm contain only the names of attorneys who are or were (if deceased) licensed to practice law in New Jersey.

Leonard Jacoby and Stephen Meyers are California attorneys who formed a profit-making law firm to

provide a large middle-class clientele with standardized legal services. Founded in 1972, the firm used media advertising, including television, to expand its operations. Today the firm operates 75 neighborhood law offices in California and New York under the name of Jacoby and Meyers.

In 1980 Jacoby and Meyers requested an opinion from the New Jersey Supreme Court's Advisory Committee on Professional Ethics. They wanted to know whether DR. 2-102(C) would permit them to use the name "Jacoby and Meyers" for a New Jersey law office that they wanted to open. Because neither Jacoby nor Meyers is licensed to practice law in New Jersey, their office here would be supervised by a licensed New Jersey attorney. In its Opinion Number 475 the Advisory Committee on Professional Ethics decided that the Rule did forbid the use of that name because neither of the named attorneys was licensed in this State.

Jacoby and Meyers petitioned the Supreme Court for review of Opinion Number 475. They argued that the Rule as applied to them by

the Committee is unconstitutional in that it deprives them of their rights under the First Amendment, Commerce Clause, Privileges and Immunities Clause, and Equal Protection Clause of the U.S. Constitution. In the alternative, Jacoby and Meyers aruged that they should be granted an exemption from the application of that Rule. The Supreme Court granted Jacoby and Meyers' petition for review and also permitted the New Jersey State Bar Association to argue in the case and file a brief.

HELD: Disciplinary Rule 2-102(C) was correctly applied by the Committee to Jacoby and Meyers. The Rule does not violate their constitutional rights.

1. The First Amendment to the U.S. Constitution does not protect the use of the firm name "Jacoby and Meyers" in New Jersey. The use of a name that includes attorneys not licensed here will deceive at least some consumers of legal services. The Rule's prohibition of the use of the name Jacoby and Meyers does not violate the First Amendment's protection of commercial speech (pp. 15, 18).

2. Because New Jersey attorneys are prohibited from advertising on television (DR. 2-101(D)), and because Jacoby and Meyers' New York offices advertise on television stations which transmit into New Jersey, any use of the Jacoby and Meyers name in New Jersey would give that firm an unfair advantage over other New Jersey firms who comply with the Rule. Therefore, DR. 2-101(D) prevents New Jersey attorneys from advertising any association with Jacoby and Meyers (pp. 19-21).

3. Disciplinary Rule 2-102(C) does not unduly burden inter-state commerce in legal services and does not discriminate against non-residents of the state. It applies equally to all persons, resident or non-resident who are not members of the New Jersey Bar. Therefore, it does not violate the Commerce Clause of the U.S. Constitution (pp. 23-26).

4. Disciplinary Rule 2-102(C) does not offend the Privileges and Immunities Clause of the U.S. Constitution because it does not compel unequal treatment of residents and non-residents with respect to "fundamental privileges".

The practice of law is not a "fundamental" privilege, and the Rule treats licensed non-resident attorneys precisely the same as licensed resident attorneys (pp. 27-28).

5. Disciplinary Rule 2-102(C) does not violate the Equal Protection Clause of the U.S. Constitution. Its discrimination against firm names containing the names of lawyers not licensed in New Jersey in favor of firm names containing the names of deceased or retired partners is rationally related to the goal of protecting prospective consumers of legal services (pp. 29-31).

6. The wisdom of retaining DR. 2-102(C) and DR. 2-101(D) should be tested by allowing a full hearing on all points of view and an in-depth investigation of the underlying intersts (p. 32).

Opinion Number 475 of the Advisory Committee on Professional Ethics is affirmed. Petitioners' request for exemption from the Rule is denied. Disciplinary Rules 2-102(C) and 2-101(D) will be referred to a special Supreme Court

Committee for evaluation and report.

HANDLER, J., filed a separate opinion concurring in part and dissenting in part. He agrees that Disciplinary Rule 2-102(C) prohibits law firm names which include the names of attorneys not licensed in New Jersey and that the Rule is constitutional. However, he does not believe that the Court should deal with the question of whether a national law firm or a local affiliate of that firm will be in violation of our State's ban on television and radio advertising if the national firm advertises on out-of-state television without even mentioning its New Jersey affiliate. That question is premature, complex and controversial. He would await a more suitable case for determining the right of attorneys to advertise on television and radio.

APPENDIX C

SUPREME COURT OF NEW JERSEY

September Term 1981

DOCKET NO. A-82

CIVIL ACTION

ON PETITION FOR REVIEW OF OPINION 475 OF THE ADVISORY COMMITTEE ON PROFESSIONAL ETHICS AND DR 2-102(C)

NOTICE OF APPEAL TO THE

SUPREME COURT OF THE UNITED STATES

Petitioner JACOBY & MEYERS hereby appeals to the United States Supreme Court from the opinion and judgment of the Supreme Court of New Jersey filed on April 28, 1982.

This appeal is being taken pursuant to Title 28 United States Code, Section 1257(2).

Petitioner JACOBY & MEYERS will be designated as the appellant in the United States Supreme Court. Respondent Advisory Committee on Professional Ethics of the Supreme Court of New Jersey will be designated as one of the appellees. Intervenor New Jersey State Bar Association will also be designated as one of the appellees. Petitioner will designate this Supreme Court of New Jersey as an appellee, also, because respondent Advisory Committee is merely a committee of

the Supreme Court and because the Supreme Court promulgated DR 2-102(C).

This Notice of Appeal is being filed by attorney Katharine J. Sweeney, a member of the Bar of the State of New Jersey, attorney for petitioner JACOBY & MEYERS.

Katharine J. Sweeney
Sweeney, Bozonelis,
Staehle & Woodward

Attorney for Petitioner
JACOBY & MEYERS

By
Karl R. Woodward for
Katharine J. Sweeney

Dated: July 20, 1982

CERTIFICATE OF SERVICE

On July 20, 1982, I mailed one copy with first class postage prepaid of the within NOTICE OF APPEAL to the following:

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I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

Dated: July 20, 1982, at Chatham, New Jersey.

Karl R. Woodward

NO. 82-139

Office - Supreme Court, U.S.
FILED
OCT 6 1982
ALEXANDER L. STEVAS,
CLERK

In the

Supreme Court of the United States

October Term, 1982

JACOBY & MEYERS, a partnership,

Appellant,

vs.

SUPREME COURT OF NEW JERSEY; ADVISORY COMMITTEE ON PROFESSIONAL ETHICS OF THE SUPREME COURT OF NEW JERSEY; and NEW JERSEY STATE BAR ASSOCIATION,

Appellees.

On Appeal from the Supreme Court of New Jersey

MOTION OF APPELLEE SUPREME COURT OF NEW JERSEY TO DISMISS OR AFFIRM

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Question Presented

Does DR 2-102(C), a Rule of Discipline of the Supreme Court of New Jersey, which prohibits the practice of law under a firm name unless each named partner was or is a member of the New Jersey bar, violate the First and Fourteenth Amendments, the Commerce Clause, the Privileges and Immunities Clause and the Equal Protection Clause of the Constitution of the United States as applied by the Supreme Court of New Jersey to permit affiliation by out-of-state law firms with New Jersey firms and, further, to permit advertisement of such affiliation consistent with New Jersey disciplinary rules regulating attorney advertising?

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NO. 82-139

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

JACOBY & MEYERS, a partnership,

Appellant,

vs.

SUPREME COURT OF NEW JERSEY; ADVISORY COMMITTEE ON PROFESSIONAL ETHICS OF THE SUPREME COURT OF NEW JERSEY; and NEW JERSEY STATE BAR ASSOCIATION,

Appellees.

On Appeal from the Supreme Court of New Jersey

MOTION OF APPELLEE SUPREME COURT OF NEW JERSEY TO DISMISS OR AFFIRM

The appellee Supreme Court of New Jersey respectfully moves pursuant to Rule 16(1)(b) and (d) to dismiss this appeal or affirm the judgment of the Supreme Court of New Jersey on the ground that the constitutional questions presented are so insubstantial as to obviate the need for further review, and also because the case does not raise any issues of special importance, does not conflict with federal precedent, was correctly decided below, and may be rendered moot upon the completion of pending State proceedings.

Counter-Statement of the Case

With the adoption of the 1947 State Constitution, the existing decentralized regulation of the legal profession in New Jersey was revamped to establish the Supreme Court of New Jersey, the State's highest appellate court, as the exclusive regulator of the practice of law in the State.* Thus, Article VI, §II, par. 3 of the New Jersey Constitution provides that the Supreme Court of New Jersey,

> "shall make rules governing the administration of all courts in the State and, subject to law, the practice and procedure in all such courts . . . [and] shall have jurisdiction over the admission to the practice of law and the discipline of persons admitted."

As consistently interpreted by the Supreme Court of New Jersey, this constitutional provision empowers the court to establish and supervise the obligations and conditions as to the practice of law from admission to disbarment and in "every area in which unjust or unethical conduct might afflict the public at the hands of those admitted by the court to the practice of law." *American Trial Lawyers* v. *New Jersey Supreme Court*, 66 N.J. 258, 264, 330 A.2d 350, 353 (1974). See also *In re LiVolsi*, 85 N.J. 576, 428 A.2d 1268 (1981); *State* v. *Rush*, *supra*, 46 N.J. at 410, 217 A.2d at 447. Moreover, in supervising the practice of law in the State, the Supreme Court of New Jersey has "scrupulously endeavored to protect against even the slightest propensity that the public will be deceived or

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* Prior to 1947, control over the admission of attorneys to the practice of law was fragmented with the former Supreme Court recommending, and the Governor approving, the licensing and admission of attorneys to practice in the State. *State* v. *Rush*, 46 N.J. 399, 411-412, 217 A.2d 441, 447 (1966).

misled." *In re Professional Ethics Opinion 447*, 86 N.J. 473, 478, 432 A.2d 59, 61 (1981) (upholding disciplinary rule which prevents attorneys from including non-legal qualifications on law firm letterheads).

In the exercise of its constitutionally delegated powers, the Supreme Court of New Jersey has adopted the Disciplinary Rules of the Code of Professional Responsibility of the American Bar Association, as amended and supplemented by the court, to govern the conduct of the members of the bar of this State. See N.J. Ct. R. 1:14 (Ra1).* To assist it in enforcing the New Jersey Disciplinary Rules, the court established the Advisory Committee on Professional Ethics, which Committee is authorized to accept inquiries and issue opinions concerning proper conduct for members of the legal profession under the disciplinary rules. N.J. Ct. R. 1.19-1 *et seq.* (Ra2 to Ra6). A right of direct review by the Supreme Court of New Jersey of an opinion of the Advisory Committee is available to any aggrieved member of the bar under N.J. Ct. R. 1:19-8 (Ra4 to Ra5).

Disciplinary Rule (DR) 2-102(C), as promulgated by the Supreme Court of New Jersey, prohibits the use of a law firm name in the State "unless all those named are or were members of the bar in New Jersey." In September 1980, the law firm of Jacoby & Meyers requested an opinion from the Advisory Committee on Professional Ethics as to whether DR 2-102(C) would permit the use of the Jacoby & Meyers name in connection with a law practice that the firm proposed to establish in New Jersey. Both of the named partners of the firm, Leonard Jacoby and Stephen Meyers, are members of the California bar; they are not,

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* As used throughout, "Ra" refers to the appendix to this motion to dismiss or affirm; "Aa" refers to the appendix to appellant's Jurisdictional Statement.

however, licensed to practice in New Jersey. In 1972, they had formed the law firm of Jacoby & Meyers to serve a large middle-class clientele with basic, standardized legal services. From the time of its origin in California ten years ago, the firm has expanded considerably through the use of media advertising and by opening numerous neighborhood law offices staffed by local attorneys. In 1979 the firm opened several offices in New York under its California name, Jacoby & Meyers. These offices are staffed by New York attorneys under the supervision of a partner licensed to practice in New York. At present, the firm has 75 offices, interviews approximately 500 clients per day, and estimates that it accepts about 600 new matters each week.

In response to the inquiry made by Jacoby and Meyers, the Advisory Committee ruled that the use of Jacoby & Meyers as a New Jersey law firm name was prohibited by the plain language of DR 2-102(C) because neither Leonard Jacoby nor Stephen Meyers had ever been licensed to practice in New Jersey. N.J. Advisory Comm. on Professional Ethics, Op. 475, 107 N.J.L.J. 283 (April 2, 1981) (Aa-A1 to Aa-A3). Thereafter, on April 3, 1981, Jacoby & Meyers petitioned the Supreme Court of New Jersey for review of the Advisory Committee opinion under N.J. Ct. R. 1:19-8, claiming that insofar as DR 2-102(C) bars the use of the Jacoby & Meyers firm name in New Jersey, the rule unconstitutionally infringes upon the firm's First Amendment rights and violates the Commerce, Privileges and Immunities, and Equal Protection Clauses of the United States Constitution. The Jacoby & Meyers petition was granted and subsequently, the New Jersey State Bar Association was permitted to intervene in support of the disciplinary rule.

In a decision issued on April 29, 1982, the Supreme Court of New Jersey upheld the constitutionality of DR 2-102(C). *In re Professional Ethics Advisory Comm. Op.*

475, 89 N.J. 74, 444 A.2d 1092 (1982) (Aa-B1 to Aa-B98). As interpreted by the court, this rule reflects the long standing New Jersey custom of limiting law firm names in the State to the names of lawyers admitted to practice in New Jersey, but permits out-of-state and New Jersey law firms to affiliate and to advertise such affiliation (Aa-B36). Although the court considered DR 2-102(C) as limited by its decision to be clearly constitutional, it ordered a reexamination of the rule so as to scrutinize further and in depth "the effects of the rule and its benefits" (Aa-B5; see generally Aa-B5 to Aa-B7). It consequently created a special Supreme Court Committee to evaluate DR 2-102(C),* conduct hearings, and prepare a report and recommendations for submission to the court for final action, including a possible rule change. In light of the importance of the matter, the court asked the committee to provide its report by January 1, 1983 (*Id.*). The committee is currently studying the rule and has scheduled hearings for November 1982. The future retention of the rule is thus uncertain.

As to the constitutionality of DR 2-102(C), however, the Supreme Court of New Jersey carefully analyzed and correctly rejected the contentions of Jacoby & Meyers under the applicable precedents of this Court. In regard to the First Amendment challenge, the court held that the use of an official designation such as a law firm name could be regulated without offending the First Amendment in order to prevent practices inherently misleading to the public, citing *Friedman* v. *Rogers*, 440 U.S. 1 (1979) (upholding a Texas regulation prohibiting the practice of

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* At the same time the court referred DR 2-101(D), the ban on television advertising by New Jersey attorneys, for similar re-evaluation and study in light of certain facts which came to light during the course of this case.

optometry under a trade name because of the potential for deception inherent in the use of trade names). The court specifically found that New Jersey law firm names containing the names of out-of-state attorneys were inherently misleading since the universal practice throughout the history of the legal profession in this State has been to include only New Jersey attorneys in firm names, and since the public expectation that those named in New Jersey firms are licensed to practice in New Jersey has been reinforced by the long existence of the rule (Aa-B30 to Aa-B36). Given the potential for deception inherent in out-of-state firm names in New Jersey, the court upheld the prohibition only against their use as firm names under the rationale of *Friedman* v. *Rogers, supra* (Aa-B20 to Aa-B32).

By providing that New Jersey firms may affiliate with out-of-state firms and advertise that affiliation (Aa-B34 to Aa-B41, citing *In re R.M.J.*, 102 S.Ct. 929 (1982)), the court below narrowed the impact of its ruling and thereby adhered to the directive of this Court to make restrictions upon commercial speech no broader than reasonably necessary to prevent deception. By expressly authorizing this alternative, the Supreme Court of New Jersey sought to promote the legitimate state concern of ensuring that the official status of an attorney as one licensed to practice in New Jersey be conveyed with accuracy and clarity, while nevertheless accommodating the trend toward the multistate practice of law (Aa-B37 to Aa-B41). The court concluded that such an accommodation of interests, with only the narrowest limitation on the use of firm names to prevent deception, is consistent with the First Amendment guarantee of freedom of speech as that guarantee has been applied to commercial speech (Aa-B20 to Aa-B46; citing *Virginia Pharmacy* v. *Va. Citizens Consumer Council*, 425 U.S. 748

(1976), and *Bates* v. *State Bar of Arizona*, 433 U.S. 350 (1977).

The court next rejected appellant's Commerce Clause claim, finding that the challenged rule addresses legitimate local concerns and is not a protectionist measure. Since DR 2-102(C) applies to all nonlicensed attorneys equally whether they are residents of New Jersey or not, the court found no discrimination and consequently no violation of the Commerce Clause (Aa-B47 to Aa-B49; citing *Huron Portland Cement Co.* v. *Detroit*, 362 U.S. 440 (1960)). It went on to observe, however, that the rule is valid even under the two-part balancing test of *Pike* v. *Bruce Church, Inc.*, 397 U.S. 137 (1970), since it is rationally related to the legitimate state concern of preventing deception and creates only a minimal burden on interstate commerce, if any (Aa-B49 to Aa-B51). The court also viewed the Commerce Clause question in light of the strong state interest in regulating the bar recognized in *Goldfarb* v. *Virginia State Bar*, 421 U.S. 773 (1975), and *Leis* v. *Flynt*, 439 U.S. 438 (1979). Quoting from *Leis* v. *Flynt*, *supra*, 439 U.S. at 701, the court emphasized that "the Constitution does not require that because a lawyer has been admitted to the bar of one State, he or she must be allowed to practice in another" (Aa-B53). Given this well established limitation in the practice of law, which clearly burdens interstate legal practice substantially more than the disciplinary rule in question, the court determined that the firm name restriction in New Jersey similarly constituted a valid regulation of the bar and had but a wholly incidental impact on interstate commerce. Consequently, the court concluded that the Commerce Clause challenge raised by Jacoby & Meyers was groundless (Aa-B50 to Aa-B56).

It extended this reasoning to reject as well the claims raised by the appellant under the Privileges and Immunities Clause. Thus, the court held that the right asserted—the right to use the name of Jacoby & Meyers for a New Jersey law firm even though neither named partner is licensed to practice in the State—simply was not a fundamental right insulated from valid state regulation by the Privileges and Immunities Clause (Aa-B57 to Aa-B59; citing *Baldwin* v. *Montana Fish & Game Comm'n*, 436 U.S. 371 (1978), and *Leis* v. *Flynt*, *supra*). Moreover, since DR 2-102(C) does not discriminate against nonresidents *per se*, but rather permissibly differentiates between members of the New Jersey bar and nonmembers without regard to their place of residence, the court found that there had not been discrimination based on residency, a finding fatal to appellant's privileges and immunities claim (Aa-B59 to Aa-B61).

Finally, the court below considered and rejected appellant's contention that DR 2-102(C) offends the Equal Protection Clause "by unreasonably discriminating between classes of partnership names" since the rule permits the names of deceased partners to be used by New Jersey firms while barring firm names containing lawyers unlicensed in the State (Aa-B61 to Aa-B62). In reviewing this allegation, the court applied the rational relationship test since the rule neither infringed upon a fundamental right (for the right to the use of a particular law firm name cannot be deemed of fundamental importance), nor burdened a suspect class (for lawyers not licensed in New Jersey are not thereby members of a class, such as race or religion, deserving of special protection under the Constitution) (Aa-B62 to Aa-B64; citing *Allied Stores* v. *Bowers*, 358 U.S. 522 (1959), and *Minnesota* v. *Clover Leaf Creamery Co.*, 449 U.S. 456 (1981)). Furthermore, the court pointed

to the important distinctions between prohibiting the use of the Jacoby & Meyers name and requiring a change of name by New Jersey firms upon the death of a named partner (Aa-B65 to Aa-B66). Certainly, in the latter case the inevitable change of name would be a source of confusion "without preventing deception where the practice of the firm remains essentially unchanged" (Aa-B67). Such distinctions rationally relate to the classifications established which are "therefore constitutionally permissible under the Equal Protection Clause."* *Id.*

Based upon the foregoing analysis, the Supreme Court of New Jersey sustained the validity of DR 2-102(C) as interpreted in its opinion. Thereafter, on July 20, 1982, Jacoby & Meyers filed a Notice of Appeal with this Court pursuant to 28 U.S.C. §1257(a). Subsequently, appellants filed a Jurisdictional Statement, and this motion on behalf of the Supreme Court of New Jersey followed.

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* The court also noted that even if some deception resulted from the challenged rule, it is not obligated to deal with each and every potential evil at once but, rather, may seek solutions to such problems according to the priorities it deems most appropriate (Aa-B56; citing *Williamson* v. *Lee Optical*, 348 U.S. 483, 489 (1955).

ARGUMENT

As interpreted by the Supreme Court of New Jersey, DR 2-102(C) permits affiliation between out-of-state law firms and New Jersey law firms as well as advertisement of such affiliation; thus, although the rule requires that the name of a New Jersey firm contain only the names of the partners who are or were members of the New Jersey Bar, it does not implicate any question of constitutional significance so as to warrant plenary review by the Court.

As the exclusive regulator of the practice of law in the State of New Jersey, the Supreme Court of New Jersey has repeatedly recognized its responsibility for the proper functioning of the judicial system and, particularly, for "maintaining public confidence" in that system. *In re LiVolsi, supra,* 85 N.J. at 585, 428 A.2d at 1272. In carrying out this responsibility, the court has been mindful of the need to act "with just and decent regard for all vital interests concerned, including those of the public, the bench, the bar and the individual respondents." *In re Logan,* 70 N.J. 222, 225, 358 A.2d 787, 789 (1976). Where questions have arisen as to the continued validity of its rules, or as to their necessity or viability, the Supreme Court of New Jersey has unhesitatingly undertaken an examination of the challenged policies. See *In re Sackman,* 90 N.J. 521, —— A.2d —— (1982) (N.J. Ct. R. 1.21-1(a) modified so as to permit the practice of law in New Jersey by licensed New Jersey attorneys, whether resident or non-resident, upon the condition that such attorneys maintain a *bona fide* office in the State; rule referred to committee constituted to examine the question of firm names to consider also the office requirement of the modified rule); *In re LiVolsi, supra* (review of constitutionality

and desirability of Fee Arbitration Committees, N.J. Ct. R. 1:20A-1 *et seq.*, requiring arbitration of attorney fee disputes upon a client's request, whether the lawyer consents or not, or upon a lawyer's request if the client consents; constitutionality of procedures upheld; need for amendment of rules to provide for limited right of appeal acknowledged); *American Trial Lawyers* v. *N.J. Supreme Court, supra* (constitutionality of rule establishing graduated schedule of maximum contingent fees for tort litigation upheld); *In re NBC*, 64 N.J. 476, 317 A.2d 695 (1974) (Canon of Judicial Ethics barring courtroom sketching during court seessions or recesses modified). As these New Jersey cases indicate, the rules of the State's highest court

> ". . . are never immutable. Applications for their review are never foreclosed [for] . . . [t]he Court does not adopt its rules to promote or brook injustice, but, as best it can, to secure justice, and justice under Constitution and law." *American Trial Lawyers* v. *N.J. Supreme Court, supra*, 66 N.J. at 267, 330 A.2d at 355.

In conformity with this policy, the Supreme Court of New Jersey has considered and interpreted DR 2-102(C) and, further, has referred this rule, along with DR 2-101 (D), to a special Supreme Court Committee for additional intensive study (Aa-35 to Aa-38). Although the court found no constitutional infirmity in DR 2-102(C) it sought reevaluation of the rule, stating:

> "The Court's responsibility in regulation of the State bar is fundamental. We have plenary and exclusive control over both admission to the bar and the practice of law. We seek to exercise that control in the interests of the public. In a rapidly chang-

> ing world we should be careful to remain responsive to the public's needs. However, it would be wrong to alter existing rules and the legitimate expectations they create, without an understanding of what effects the changes may have. We therefore need a thorough review and a study." (Aa-B8 to Aa-B9).

However, even in its present form DR 2-102(C), as interpreted by the Supreme Court of New Jersey, represents a balanced approach addressing not only the potential for deception inherent in the use of firm names in New Jersey where named partners have not been admitted in this State but, also, the demands of a "rapidly changing world" in which multistate practice is increasingly prevalent* (Aa-B8; see also Aa-B39 to Aa-B40). It is the long standing custom locally that the names of New Jersey law firms include only the names of attorneys licensed to practice in the State. This well established practice raises legitimate expectations on the part of New Jersey citizens that the men and women whose names appear as firm names in this State have obtained admission to the bar in this State. Henry S. Drinker, in his fundamental work, *Legal Ethics* (1953), stated the basis for the firm name limitation in simple, unequivocal terms:

> "The name of a lawyer not admitted locally may not be included in the firm name (even though he may properly be a member of the firm) despite a statement on the letterhead, shingle, and law list that he is admitted only in the foreign state, since the firm name appearing elsewhere without such ex-

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* Nonetheless, the presentation of the Supreme Court Committee's report and recommendations may well dictate a rule change in the near future. The court has explicitly stated ". . . our opinion takes no position about the wisdom of retaining the rule" (Aa-B67).

planation would imply that all the members in the name were authorized to practice locally." At 230.*

Where long established practice and usage buttress the strictures of rule, the public would indeed be misled by a departure from such practice. While a rule change, if deemed appropriate, will *a fortiori* alter local custom, nonetheless common understandings can be expected to diminish only over time (see Aa-B37). Moreover, in considering restrictions on advertising by attorneys, this Court has noted that in this area there are "special risks of deception—'[B]ecause the public lacks sophistication concerning legal services, misstatements that might be overlooked or deemed unimportant in other advertising may be found inappropriate in legal advertising.'" *In re R.M.J., supra,* 102 S.Ct. at 936, quoting *Bates* v. *State Bar of Arizona,* 433 U.S. 350, 383 (1977) (footnote omitted). Although custom and the lack of sophistication on the part of the public clearly support the reasonableness of DR 2-102(C), the Supreme Court of New Jersey specifically narrowed its scope. As interpreted, this rule not only furthers the legitimate interests of avoiding practices likely to deceive the public, but also reasonably accommodates the realities of interstate practice. In this appeal, Jacoby & Meyers challenges the constitutionality of the rule as limited by the court below.

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* See *ABA Comm. on Professional Ethics,* Formal Op. 318 (1967), which provides a history of the firm name question to the date of the opinion. It is interesting to note the committee's comment in §I that "[v]irtually all of the [prior] opinions . . . recognize the significance of local custom and usage in determining whether a firm name may be false or misleading . . ." Appellant emphasizes that the *ABA Model Code of Professional Responsibility* DR 2-102(C) permits out-of-state firm names; however, the *ABA Model Code* has never been binding on the states and, by its own terms, frequently defers to local custom. See *e.g., ABA Model Code* DR 2-102(B).

A. The narrow restriction on the use of the Jacoby & Meyers firm name in New Jersey to prevent deception falls so clearly within the parameters of permissible regulation under the Commercial Speech Doctrine as to totally obviate the need for further review.

Under the ruling of the New Jersey Supreme Court, appellant may not open a law firm in New Jersey under the name Jacoby & Meyers since neither named partner is a member of the New Jersey bar. The decision below does not completely foreclose use of the Jacoby & Meyers firm name in the State, however, for appellant may affiliate with a New Jersey law firm and advertise the affiliation using its California name. As the court explicitly held in relation to out-of-state firms:

> "Lawyers in New Jersey affiliated with such a firm will be able to signify in an appropriate manner their affiliation on letterheads, professional cards and office signs, so long as they make clear that the out-of-state firm is not licensed to practice in New Jersey. Similarly, the multijurisdictional firm will be free to advertise its association with a New Jersey affiliate, consistent with this State's rule on lawyer advertising." (Aa-B40 to Aa-B41).

The restriction on the use of the Jacoby & Meyers firm name in New Jersey is consequently extremely narrow. Although appellant argues that this minimal incursion upon the use of its firm name violates the First Amendment, the disciplinary rule in question falls so clearly within the parameters of permissible regulation of commercial speech as to totally obviate the need for further review of this matter.

While this Court has afforded some protection to commercial speech in a doctrine evolving from *Virginia Phar-*

macy v. *Va. Citizens Consumer Council, supra,* it has nevertheless repeatedly stressed that the difference between commercial speech and other varieties of speech entitle the former to a different and lesser degree of protection than the latter. This is so primarily because commercial speech is inextricably linked to commercial activity and is carefully calculated to promote business profits, thus making it less likely to be inhibited by proper regulation than other forms of speech. *Id.* at 771 n. 24; *Bates* v. *State Bar of Arizona, supra,* 433 U.S. at 383; *Friedman* v. *Rogers, supra,* 440 U.S. at 10; *Central Hudson Gas* v. *Public Service Com'n of New York,* 447 U.S. 557, 562-564 (1980). Moreover, since the First Amendment's concern for commercial speech is based upon the informational function of advertising, regulations aimed at promoting truthful commercial communications and fair dealing in the marketplace are permitted. *In re R.M.J., supra,* 102 S.Ct. at 937.

The necessary corollary to the foregoing proposition is that commercial speech which is false, deceptive, or misleading is subject to restraint. *Id.; Central Hudson, supra,* 447 U.S. at 562-564; *Virginia Pharmacy, supra,* 425 U.S. at 771. States thus retain the power to regulate commercial activity deemed harmful to the public even when the activity in question involves speech. *Friedman* v. *Rogers, supra,* 440 U.S. at 10; *Ohralik* v. *Ohio State Bar Assn.,* 436 U.S. 447, 456 (1978). In exercising this power, states may place reasonable restrictions on the time, place, and manner of advertising. *Bates* v. *State Bar of Arizona, supra,* 433 U.S. at 384; *Virginia Pharmacy, supra,* 425 U.S. at 771-772. Such restrictions may require, for example, that a commercial message appear in such form, or include such additional information or warnings, as to insure that it does not lead to deception. While "[m]isleading advertising may be prohibited entirely," and states may im-

pose appropriate restraints "when the particular content or method of the advertising suggests that it is inherently misleading or when experience has proven that in fact such advertising is subject to abuse," restrictions upon such advertising "may be no broader than reasonably necessary to prevent the deception." *In re R.M.J., supra,* 102 S.Ct. at 937.

The narrow restriction imposed upon the use of out-of-state law firm names by DR 2-102(C) is clearly authorized by the foregoing principles because, as interpreted by the Supreme Court of New Jersey, the disciplinary rule sweeps no broader than reasonably necessary to prevent the potential for deception which could arise if named partners in a New Jersey firm are not and never have been members of the State bar. In fact, by permitting the advertisement of affiliation with out-of-state law firms, the rule merely restricts the manner in which the Jacoby & Meyers name can be used in New Jersey; it does not prohibit mention of the name altogether. Since the rule constitutes a reasonable manner restriction aimed at preventing deception and permits an alternate means of communicating the connection or affiliation between out-of-state and New Jersey firms, it simply does not give rise to an issue of constitutional significance.

The propriety of upholding DR 2-102(C) against a First Amendment challenge is also particularly clear when this case is analyzed under *Friedman* v. *Rogers, supra.* In *Friedman,* the Court sustained a Texas regulation prohibiting the practice of optometry under a trade name, noting that the restriction in question had only the most incidental effect on the content of commercial speech. 440 U.S. at 16. The decision emphasized that while the use of a trade name could enhance the solicitation of patronage, the name itself had no intrinsic meaning and was consequently

quite different from and less entitled to protection than advertising about the price and availability of products and services. The Court thus distinguished the use of a trade name from the advertising protected in *Virginia Pharmacy* and *Bates*. 440 U.S. at 12, 16. It noted that while a trade name could acquire meaning over time through ill-defined associations, the name had the potential to be manipulated and used to mislead the public. Consequently, reasonable regulation in the form of a ban on the use of trade names in the practice of optometry was found necessary to prevent the very real potential for deception.

While the holding in *Friedman* compels the conclusion reached on First Amendment grounds by the Supreme Court of New Jersey in the Jacoby & Meyers matter, it is important to point out that the restrictions in both cases simply prohibit the practice of closely regulated professions under particular kinds of names found to be inherently misleading to the consumer public. Such limited restraints have a minimal impact on commercial speech, for the factual information associated with the trade or firm name—such as the type of services offered and the prices charged—may be communicated freely to the public.* In fact, it is deserving of note that the rule at issue here is even less restrictive than the one upheld in *Friedman* because DR 2-102(C), as interpreted by the Supreme Court of New Jersey, allows out-of-state and New Jersey law firms to affiliate and publish such affiliations, while the

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*Upon affiliation with a New Jersey firm, Jacoby & Meyers may advertise the connection and the services and prices offered by its New Jersey affiliate consistent with the New Jersey Disciplinary Rules governing legal advertising. Since such activities are consistent with DR 2-102(C), the operation of this rule will not inhibit the provision of low-cost, standardized legal services in New Jersey.

Texas rule prohibited even the mention of a trade name in connection with the practice of optometry. In construing the disciplinary rule to permit more communication than allowed in *Friedman*, the court below properly accommodated the need to regulate commercial activity to protect the public with the directive contained in *In re R.M.J.*, *supra*, 102 S.Ct. at 937, that restrictions on commercial speech be limited to those deemed reasonably necessary to prevent deception. The narrow restraint resulting from this accommodation is obviously well within the parameters established by this Court for permissible regulation of commercial speech.

Despite the clear and persuasive analogy between the trade name at the heart of *Friedman* and the law firm name involved here, Jacoby & Meyers argues in its Jurisdictional Statement that *Friedman* is not controlling in this case since it applies only where actual abuse or deception has been demonstrated. This position is plainly wrong. In *Friedman*, although the Court took notice of a history of abuse in the commercial practice of optometry in Texas, no actual deception was shown on the record involving the particular trade optometrists before the Court. The Court consequently relied upon the potential for deception inherent in the use of trade names and the large-scale commercial practice of optometry in reaching its decision to uphold the law. 440 U.S. at 14-16. And recently, in *In re R.M.J.*, *supra*, 102 S.Ct. at 937, the Court reaffirmed that restrictions on commercial speech are appropriate either when advertising is inherently likely to deceive, or when the record indicates that a particular form or manner of advertising has been deceptive. It is clear, therefore, that states may regulate commercial speech when the nature of the speech is likely to mislead the public.

Appellant has also tried to avoid both the holding of *Friedman* and the basic tenet of commercial speech doc-

trine, which permits the regulation of misleading advertising, by asserting that the real purpose of DR 2-102(C) is not, as the court below held, to prevent deception, but rather to protect New Jersey lawyers from out-of-state competition. Jacoby & Meyers overlooks the fact, however, that this Court cannot disregard the reasons given by the Supreme Court of New Jersey to support the disciplinary rule in question. *Martin* v. *Walton*, 368 U.S. 25, 26 (1961), dismissing *Martin* v. *Davis*, 187 Kan. 473, 357 P. 2d 782 (1960) (upholding a rule which required Kansas attorneys who practiced regularly in other states to retain local counsel before appearing in the Kansas courts). See also *Brown* v. *Supreme Court of Virginia*, 359 F. Supp. 549 (E.D. Va. 1973), summarily aff'd 414 U.S. 1034 (1974) (Virginia bar rule governing admission by reciprocity upheld as supporting a valid state interest despite claim that one effect of the rule was to protect resident Virginia attorneys from competition). Deference should thus be given to the findings of the Supreme Court of New Jersey since it is the forum best equipped to determine and articulate the purpose of a disciplinary rule it adopted for the regulation of the bar in the State. Moreover, as demonstrated in the opinion below, long standing custom and the universal application of the firm name rule in New Jersey have fostered consumer expectations which may not be prevalent elsewhere, but which realistically could be frustrated by permitting the names of attorneys unlicensed in the State to be used in New Jersey law firm names. The prevention of deception is thus truly at the heart of DR 2-102(C). Finally, in regard to economic protectionism, it is important to note that the Supreme Court of New Jersey recently changed a disciplinary rule to provide for equal treatment between resident and nonresident licensed attorneys. In re *Sackman*, *supra*, 90 N.J. at 522. This opinion makes clear that the court is not swayed by the financial interest of the

local bar, but, rather, wants to ensure that more qualified lawyers are available to New Jersey citizens. 90 N.J. at 530. The protectionist motive ascribed by appellants to the court below consequently is unsupportable.

The Supreme Court of New Jersey properly applied the commercial speech doctrine in sustaining the extremely narrow restriction on the use of out-of-state law firm names in New Jersey against appellant's First Amendment challenge. In fact, in light of the alternate means of communication specifically authorized by the court below, and the wholly incidental impact on commercial speech caused by the valid bar regulation contained within DR 2-102(C), the First Amendment claim raised by Jacoby & Meyers in this appeal is so insubstantial as to warrant either dismissal by the Court, or summary affirmance of the decision of the Supreme Court of New Jersey.

B. Since DR 2-102(C) neither discriminates based upon residency nor affects any fundamental right, it does not violate the Privileges and Immunities Clause.

The disciplinary rule at issue in this case differentiates between members of the New Jersey bar and attorneys licensed elsewhere but not admitted to practice in New Jersey. That this is so is evident from the plain language of DR 2-102(C) which allows the names of attorneys licensed to practice in the State to be used in New Jersey firm names, while prohibiting the names of unlicensed attorneys from being similarly utilized. The rule thus draws a distinction based on bar membership and not upon residency. For example, a New York or Pennsylvania resident admitted to the bar in New Jersey can practice law in the State in a firm bearing his or her name and is treated identically in this regard to New Jersey attorneys who happen to live in the State. Since DR 2-102(C) does

not discriminate on the basis of residency, its operation cannot and does not implicate the Privileges and Immunities Clause of the Constitution which prohibits a state from discriminating against nonresidents in regard to fundamental rights or essential activities. See *Baldwin* v. *Montana Fish & Game Com'n, supra,* 435 U.S. at 380-384; *Hicklin* v. *Orbeck,* 437 U.S. 518, 523-526 (1978). Distinctions based upon bar membership simply do not come within the meaning of the Clause.

The appellant's argument is also unavailing because it has failed to demonstrate that the "right" to open a law practice under its California firm name in a state where neither named partner is admitted to the bar is a fundamental right deserving of protection under the Privileges and Immunities Clause. Surely, this claimed right is not vital to the preservation of the nation as a single entity, nor does this claimed right demand recognition under a "norm of comity;" hence, it is not covered by the Clause. See *Baldwin, supra,* 436 U.S. at 383; *Austin* v. *New Hampshire,* 420 U.S. at 656, 660-662 (1975). Moreover, valid regulation of the bar pursuant to disciplinary rules such as the one in question here is precisely the kind of regulation which traditionally has been carried out on a state-by-state basis and necessarily fosters differences which merely reflect the fact that this is a nation comprised of individual states. Such differences are perfectly consistent with our system of government and do not run afoul of the Privileges and Immunities Clause. See *Baldwin, supra,* 436 U.S. at 383. If admission to the bar in one state does not give an attorney the right to practice in another state, *Leis* v. *Flynt, supra,* 439 U.S. at 443, it certainly does not give an attorney the right to open a law firm under his name in a state where he is not licensed to practice. Appellant's challenge to DR 2-102(C) based upon the Privileges and Immunities Clause is consequently totally lacking in merit and must be dismissed by the Court.

C. DR 2-102(C) regulates evenhandedly to protect the citizens of New Jersey without discriminating against or unduly burdening interstate commerce.

It is, of course, firmly established that notwithstanding the affirmative grant of authority to Congress as to the regulation of interstate commerce, the states retain broad power to legislate in matters of local concern pursuant to reserved Tenth Amendment powers. See *e.g., H. P. Hood & Sons* v. *DuMond*, 336 U.S. 525, 531-532 (1949). As stated in *Pike* v. *Bruce Church*, 397 U.S. 137, 142 (1970), and reaffirmed in *Hughes* v. *Oklahoma*, 441 U.S. 322, 331 (1979), "Where the challenged law regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden on such commerce is clearly excessive in relation to the putative local benefits." Here, the challenged rule is uniformly applicable to residents and nonresidents of New Jersey for, as noted above, the distinction created by DR 2-102(C) is based solely upon admission to the New Jersey bar and not upon residence in or out-of-state.* DR 2-102(C) is simply not discriminatory on its face or in its effect.

Moreover, as has been often recognized by this Court, "the States have a compelling interest in the practice of professions within their boundaries . . . [with] broad power to establish standards for licensing practitioners and regu-

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* In this regard, the New Jersey Supreme Court sought in *In re Sackman*, *supra*, to tailor New Jersey R. 1:21-1(a) so as to allow "interstate movement while at the same time assuring a sufficient degree of competence, accessibility and accountability." 90 N.J. at 52. An attorney who has been admitted to practice in New Jersey, and who maintains a *bona fide* office in this State (whether or not he or she resides in another state), may practice law in New Jersey.

lating the practice of professions." *Goldfarb* v. *Virginia State Bar, supra,* 421 U.S. at 792. The states' interest in regulating lawyers is "'especially great since lawyers are essential to the primary governmental function of administering justice . . .'." *Ohralik* v. *Ohio State Bar Assn., supra,* 436 U.S. at 460, quoting *Goldfarb, supra,* 421 U.S. at 792. Indeed, "[s]ince the founding of the Republic" the states and the District of Columbia have had exclusive control over the practice of law within their boundaries. *Leis* v. *Flynt, supra,* 439 U.S. at 442. In conformity with these principles, this Court has held that a lawyer licensed in one state need not be permitted to practice in another jurisdiction. *Id.* at 443, citing *Norfolk & Western R. Co.* v. *Beatty,* 423 U.S. 1009 (1975), summarily aff'g 400 F. Supp. 234 (S.D. Ill. 1975); *Brown* v. *Supreme Court of Virginia, supra.* Certainly, lawyers not admitted in New Jersey, and therefore not permitted to practice in this State, may be limited in the use of their firm names in this State, especially in light of the inherent deception attendant upon such use.

If, as appellant contends, the Supreme Court of New Jersey has sustained DR 2-102(C) for purposes of economic protectionism, it would not have interpreted DR 2-102(C) so as to permit the use of the Jacoby & Meyers name, and other such out-of-state firm names, to be used in advertising, etc., in affiliation with New Jeresy firms. In exercising its responsibility to regulate the practice of law the court below has properly determined that in order to prevent the public from being misled, this minimal burden upon interstate commerce may be sustained. In short DR 2-102(C) is not "a protectionest measure" but rather is "a law directed to legitimate local concerns, with effects upon interstate commerce that are only incidental." *Philadelphia* v. *New Jersey,* 437 U.S. 617, 625 (1978). Appellant's claim of undue burden upon interstate commerce must therefore fail.

D. Since DR 2-102(C) is rationally related to an important State interest it does not violate the Equal Protcetion Clause.

Finally, appellant claims that because New Jersey permits the use of firm names containing the names of deceased partners who were licensed to practice in this State, the prohibition on the inclusion of out-of-state partners unlicensed in New Jersey constitutes an irrational classification under the Equal Protection Clause of the United States Constitution. Preliminarily, as noted by the court below, lawyers who have not been admitted to the bar in a particular state "do not constitute a suspect class . . . deserving of extraordinary protection under the Equal Protection Clause" (Aa-B63). Further, the "right" to the use of a particular law firm name as such, rather than as an affiliate of a New Jersey firm, does not constitute an infringement upon any fundamental right protected by the Constitution. Thus, DR 2-102(C) is valid if it is "rationally related to a legitimate state interest." *New Orleans* v. *Dukes*, 427 U.S. 297, 303 (1976).

The Supreme Court of New Jersey has held that a firm name such as Jacoby & Meyers is inherently misleading. Long standing custom and usage in New Jersey has limited firm names in this State to the named partners who are or were members of the New Jersey bar. Particularly in such circumstances, the use of the Jacoby & Meyers name without opportunity for explanation (see Drinker, *Legal Ethics*, *supra*, at p. 230) would confuse the public. On the other hand, it has also been the well established practice in this State for New Jersey firms to continue under the same firm name upon the death of a named partner. See DR 2-102(B). Custom in this case therefore compels a different result, since common understandings prevent deception where New Jersey firms retain the name of a deceased

partner as part of their firm names. The court below, however, acknowledges that there may be "some potential for misleading consumers" in the deceased partner rule (Aa-B64). Nonetheless, the removal of any possible potential source of deception is not required by the Constitution—a state may consider one problem at a time, establishing priorities which appear appropriate in each case. See *Williamson* v. *Lee Optical*, 348 U.S. 483, 489 (1955).*

Even if, as appellant contends, DR 2-102(C) is to be subjected to strict scrutiny because First Amendment concerns are implicated, the State's interest in regulating the bar and in preventing deception would withstand this level of review. See *Carey* v. *Brown*, 447 U.S. 455, 461-462 (1980); *Police Department* v. *Mosley*, 408 U.S. 92, 98-99 (1972). As amended by the Supreme Court of New Jersey, the rule is "finely tailored", *Carey* v. *Brown, supra*, 447 U.S. at 461, to permit Jacoby & Meyers to associate with New Jersey firms and to advertise that association. However, commercial speech is, under the rulings of this Court, "afforded [but] a limited measure of protection, commensurate with its subordinate position in the scale of First Amendment values. . . ." *Ohralik* v. *Ohio State Bar Association, supra*, 436 U.S. at 456. See *Friedman* v. *Rogers, supra*, 440 U.S. at 10. Because commercial speech relates entirely to economic interests and not to the more basic interest in the exchange of ideas in a free and open society, the Court has refused to apply strict criteria in reviewing this form of speech. Thus, in considering the application of the overbreadth analysis in the context of ordinary commercial speech, Justice Blackmun suggested that

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* As noted earlier, the committee appointed by the Supreme Court of New Jersey is now preparing its report on DR 2-102(C) for the Court's further consideration of these issues. See *supra*, pp. 11-12.

"it seems unlikely that such speech is particularly susceptible to being crushed by overbroad regulation," *Bates* v. *State Bar of Arizona, supra,* 433 U.S. at 381, and refused to apply the stricter analysis to commercial advertising. See also *Ohralik, supra,* 436 U.S. at 465 n. 25. These precedents compel the conclusion that the Equal Protection Clause also does not require strict scrutiny of state regulations where commercial speech only is at issue.

DR 2-102(C) is clearly rationally related to an important state interest; the equal protection claim raised by the appellant does not warrant review by this Court.

CONCLUSION

It is respectfully submitted that for the foregoing reasons the appeal should be dismissed or the judgment of the Supreme Court of New Jersey affirmed because the constitutional questions presented are so insubstantial as to not require further review, and also because the case does not raise any issues of special importance, does not conflict with federal precedent, was correctly decided below, and may be rendered moot upon the completion of pending State proceedings.

Respectfully submitted,

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Dated: October 4, 1982

APPENDIX A

Rule 1:14 of the New Jersey Court Rules

RULE 1:14. CODES OF ETHICS

The Disciplinary Rules of the Code of Professional Responsibility and the Code of Judicial Conduct of the American Bar Association, as amended and supplemented by the Supreme Court and included as an Appendix to Part I of these rules, shall govern the conduct of the members of the bar and the judges of all courts of this State.

Where appropriate, the words "partnership," "attorney" and "lawyers" shall be construed to include professional corporations for the practice of law, as well as attorney employees, agents and shareholders thereof, and attorneys acting as "of counsel" thereto.

Note: Source—R.R. 1:25. Canons of Professional Ethics of the American Bar Association deleted July 7, 1971 and the Code of Professional Responsibility, as amended and supplemented, adopted July 7, 1971 to be effective September 13, 1971; amended November 27, 1974 to be effective April 1, 1975; amended July 16, 1981 to be effective September 14, 1981.

APPENDIX B

Rule 1:19 of the New Jersey Court Rules

RULE 1:19. ADVISORY COMMITTEE ON PROFESSIONAL ETHICS

1:19-1. Appointment and Organization

The Supreme Court shall appoint an advisory committee on professional ethics consisting of 15 members of the bar serving for terms of 3 years with the terms of 5 members expiring each year. A vacancy occurring during a term shall be filled for the unexpired portion thereof. The court shall annually designate a member of the committee to serve as chairman. The Administrative Director or the Courts shall serve as secretary of the committee.

Note: Source—R.R. 1:26A(a).

1:19-2. Jurisdiction

The committee shall accept inquiries only from the state bar association, from any county or local bar association, or from any member of the New Jersey bar, concerning proper conduct for a member of the legal profession under the Disciplinary Rules of the Code of Professional Responsibility of the American Bar Association as amended by the Supreme Court and other rules of this court governing the practice of attorneys. It shall not consider an inquiry involving a pending action where its opinion might affect the interests of the parties, and it may decline to accept any inquiry without stating its reasons therefor.

Note: Source—R.R. 1:26A(b) (first sentence) (c) (third sentence), (d) amended April 4, 1977, effective immediately.

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1:19-3. Form of Inquiry

All inquiries shall be addressed to the secretary who shall transmit them to the committee. They shall be in writing, shall set out the factual situation in detail, shall be accompanied by a short brief or memorandum citing the rules of court or canons of ethics involved and any other pertinent authorities, and shall contain a certificate that any opinion of the committee will not affect the interests of the parties to any pending action.

Note: Source—R.R. 1:26A(b) (second and third sentences).

1:19-4. Disposition of Inquiries

The committee may act through parts consisting of not less than 5 members, but if the opinion of any such part is not unanimous the inquiry shall be referred to the committee as a whole. No opinion shall be given by the committee as a whole unless concurred in by 9 members thereof. The opinion of the committee on any inquiry accepted for consideration shall be in writing and shall be filed with the secretary who shall transmit a copy to the person making the inquiry, and, where the committee so requests, make suitable arrangements for its publication. Published opinions shall not, insofar as practicable, identify the party or parties making the inquiry. The committee, in its discretion, may conduct a hearing on any inquiry.

Note: Source—R.R. 1:26A(c) (first, second and fourth sentences), (e).

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1:19-5. Inquiries from Supreme Court

The committee as a whole shall consider and render opinions on such matters as the Supreme Court may from time to time submit to it. Such opinions shall not be published without prior approval of the court.

Note: Source—R.R. 1:26A(f).

1:19-6. Effect of Published Opinions

Published opinions of the committee shall be binding upon the Ethics Committee in their disposition of all matters.

1:19-7. Procedure

The committee shall, subject to the approval of the Supreme Court, determine the methods and procedure to be followed in considering inquiries and expressing opinions.

Note: Source—R.R. 1:26A(g).

1:19-8. Petitions for Review

(a) Notice. Within 20 days after an opinion is published, or within 30 days after any final action of the Advisory Committee on Professional Ethics other than the publication of an opinion, any aggrieved member of the bar, bar association or ethics committee may seek review thereof by serving on the Attorney General a notice of petition for review by the Supreme Court and by filing the original notice with the Clerk of the Supreme Court.

Appendix B

The notice shall set forth the petitioner's name and address and, if he is represented, the name and address of counsel. The notice shall designate the action of the Advisory Committee on Professional Ethics sought to be reviewed and shall concisely state the manner in which the petitioner is aggrieved.

(b) Deposit for Costs. Deposit for costs shall be made in accordance with R. 2:12-5.

(c) Record on Petition for Review. If the petition for review is granted, the record on review shall be the formal opinion, if any, issued pursuant to R. 1:19-4 or R. 1:19-5, the inquiry, brief or memorandum submitted, and any documents or other evidence or proof relied upon by the Advisory Committee on Professional Ethics in arriving at its determination.

(d) Form of Petition for Review. A petition for review shall be in the form of a brief, conforming to the applicable provisions of R. 2:6 and not exceeding 15 pages if printed or 20 pages if otherwise reproduced or typed, exclusive of tables of contents, citations and appendix. It shall contain a short statement of the matter involved, the question presented, the errors complained of and the arguments in support of the petitioner's position. It shall also contain a certification by the petitioner or counsel, if any, that the petition presents a substantial question and is filed in good faith and not for purposes of delay.

(e) Service and Filing of Petition for Review. Within 10 days after filing of the notice of petition for review, 2 copies of the petition shall be served on the Attorney General and the Secretary of the Advisory Committee on Professional Ethics and 9 copies thereof shall be filed with the Clerk of the Supreme Court.

Appendix B

(f) Response to Petition for Review. The Attorney General shall within 30 days of the service of the petition serve 2 copies of his brief in opposition to the petition and file 9 copies thereof with the Clerk of the Supreme Court. The brief shall be direct and concise, shall conform to the applicable provisions of R. 2:6 and shall not exceed 15 pages if printed or 20 pages if otherwise reproduced or typed, exclusive of table of contents, citations and appendix. Within 10 days of such service, petitioner may serve 2 copies and file 9 copies of a reply brief not exceeding 9 pages if printed or 10 pages if otherwise reproduced or typed, exclusive of tables of contents, citations or appendix.

(g) Final Determination. The final determination of a petition for review may be either by written opinion or by order of the Supreme Court and shall state whether the opinion or other action of the Advisory Committee on Professional Ethics is affirmed, reversed or modified or shall provide for such other final disposition as is appropriate.

Note: Adopted April 4, 1977 to be effective immediately.

No. 82-139

Office - Supreme Court, U.S.
FILED
OCT 4 1982
ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

JACOBY & MEYERS, a partnership,

Appellant,

vs.

SUPREME COURT OF NEW JERSEY, ADVISORY COMMITTEE ON PROFESSIONAL ETHICS OF THE SUPREME COURT OF NEW JERSEY and NEW JERSEY STATE BAR ASSOCIATION,

Appellees.

ON APPEAL FROM THE SUPREME COURT OF NEW JERSEY

MOTION TO DISMISS OR AFFIRM

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The opinion of the New Jersey Supreme Court is reported at 89 N.J. 74, 444 A.2d 1092 (N.J. April 28, 1982).

Introduction

Appellee, New Jersey State Bar Association (hereinafter designated "NJSBA"), pursuant to 16.1(b) of the Revised Rules of the Supreme Court of the United States, respectfully moves this Honorable Court to dismiss the above entitled appeal, or, in the alternative, to affirm the judgment of the Supreme Court of New Jersey on the ground that the appeal fails to present a substantial federal question.

I. STATEMENT OF THE CASE

Appellant, Jacoby & Meyers, a law partnership with 75 offices in California and New York, seeks review of a decision by the Supreme Court of New Jersey which prohibits it from opening a New Jersey office under the name "Jacoby & Meyers". Initially, Appellant requested an opinion from the New Jersey Supreme Court's Advisory Commission on Professional Ethics on whether the disciplinary rule in question, DR 2-102(C), permits such use of Appellant's name. The Committee decided that the plain language of the Rule, which forbids the use of law firm names "unless all those named are or were members of the bar in New Jersey", prohibits the use of

the name Jacoby & Meyers in New Jersey because neither Leonard Jacoby nor Stephen Meyers have ever been licensed to practice law in that State.[1] *New Jersey Advisory Commission on Professional Ethics* No. 475, 107 N.J.L.J. 283 (April 2, 1981) (Ethics Opinion 475). On April 3, 1981, Appellant petitioned the Supreme Court of New Jersey for review of the Advisory Committee's opinion, pursuant to Rule 1:19-8 of the Rules Governing the Courts of the State of New Jersey. The Supreme Court granted the petition, along with a motion filed by Appellee NJSBA to intervene in support of DR2-102(C).

In its Petition, Jacoby & Meyers raised, and the Supreme Court rejected, all four of Appellant's constitutional challenges to the disciplinary rule as applied to it by the Committee. Appellant argued that the Rule deprived the firm of its rights under the First Amendment, and violated the Equal Protection, Commerce, and Privilege and Immunity Clauses of the United States Constitution. With regard to the First Amendment argument, the court held that the Amendment's protection of commercial speech does *not* protect the use of the firm name "Jacoby & Meyers" in New Jersey since the use of the name that includes attorneys not licensed therein will deceive some consumers of legal services. Furthermore, the Court held that DR 2-102(D), which prohibits New Jersey attorneys from advertising on television, must also prevent New Jersey attorneys from advertising any association with Jacoby & Meyers so long as its New York offices still advertise on television channels which are received in New Jersey. Otherwise, the use of Jacoby & Meyers name in New Jersey would give the firm an unfair advantage over New Jersey firms, which must comply with the rule against television advertising.

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1. Leonard Jacoby and Stephen Meyers are members of the bar of California, where they started their law firm in 1972.

The Court rejected Appellant's Equal Protection argument because even though DR 2-102(C) discriminates against firm names containing the names of unlicensed attorneys in favor of firm names still using the names of deceased or retired partners, the discrimination is rationally related to the legitimate state goal of protecting prospective consumers of legal services.

In reply to Appellant's Commerce Clause argument, the Supreme Court reasoned that the disciplinary rule does not unduly burden Interstate Commerce in legal services by discriminating against non-residents of New Jersey, because it applies equally to all persons, resident or non-resident, who are not members of the New Jersey Bar. Finally, the Court held that DR 2-102(C) does not offend the Privileges and Immunity Clause of the United States Constitution because it does not compel unequal treatment of resident and non-residents with respect to "fundamental privileges." The Court reached this conclusion because the practice of law is not a "fundamental privilege", and furthermore because the Rule treats licensed non-resident attorneys precisely the same as licensed resident attorneys.

II. ARGUMENT

This appeal presents no substantial question not previously decided by this court.

Appellee NJSBA respectfully submits that the question presented by this appeal is not substantial enough for this Court to set the case for argument. Therefore, the appeal should be dismissed, or, in the alternative, the judgment of the New Jersey Supreme Court should be summarily affirmed. Rule 16.1(b). In support of its assertion to the contrary, Appellant states that "This Court has frequently reviewed cases involving lawyers and the practice of law. . . (Citations omitted). However, this Court has never ruled on the issue presented herein." (Jurisdictional Statement, pages 21-23). Appellant thus implies that because this Court has not previously specifically addressed the issue as phrased by Appellant (J.S., page i), it must do so now. With all due respect to Appellant, this has not been the policy of this Court. Here, as in other cases where the Supreme Court has decided that full briefs and oral argument are not called for, the principles of the Court's prior decisions are controlling. This is all that is required. *Moore's Fed. Prac.* ¶512.01, citing *Equitable Life Assurance Society v. Brown*, 187 U.S. 308, 47 L.Ed. 190, 23 S. Ct. 123 (1902); *Zucht v. King*, 260 U.S. 174, 67 L.Ed. 194, 43 S. Ct. 24 (1922); *Patterson v. Stanolind Oil & Gas Co.*, 305 U.S. 376, 83 L.Ed. 231, 59 S. Ct. 259 (1939); *Palmer Oil Corp. v. Amerada Petroleum Corp.*, 343 U.S. 390, 96 L.Ed. 1022, 72 S. Ct. 842 (1952). The following is as brief a discussion as possible of the reasons why the issue presented herein is clearly foreclosed by this Court's prior decision.

A. *First Amendment*

Appellant contends that the New Jersey Supreme Court erroneously relied upon this Court's 7-to-2 deci-

sion in *Friedman v. Rogers*, 440 U.S. 1, 99, 59 L.Ed. 2d 100 S. Ct. 877, (1979) in finding that DR 2-102(C) does not violate Jacoby & Meyers' right to free speech guarantees under the First and Fourteenth Amendments (J.S., pages 26-26). As Appellant points out, this Court's main reason in that case for upholding a Texas statute prohibiting the use of trade names by optometrists was the local history of abuse and deception of consumers. Appellant therefore concludes that since the New Jersey Supreme Court made no reference to any such history of deception or abuse in New Jersey or elsewhere, only to hypothetical problems, the real purpose of the Disciplinary Rule must be to protect New Jersey lawyers from competition.[1] (J.S., pages 27-30). In support of this irrational conclusion, Appellant points to a statement made by the New

1. Appellant's other basis for this conclusion is that DR 2-102(B) also permits deception by allowing the names of deceased New Jersey law partners to be left in a firm's name. (J.S., pages 33-34). Appellant fails to recognize the basis for the distinction, which unfortunately may not be apparent from the face of the rule. However, the Supreme Court of New Jersey has ruled that a firm letterhead, etc. must indicate the status of a deceased partner whose name is retained. Ethics Opinion No. 25 (1979). This, of course, leaves no doubt in the mind of a potential client at least as to whom will *not* handle his case. In contrast, indicating on the letterhead of a firm doing business in New Jersey that, eg., Messrs. Jacoby & Meyers are members of the "California Bar only" does *not* make it clear to a lay person that neither attorney will have any involvement with his or her case. The average individual simply does not possess that level of understanding of the rules governing admission to practice. Moreover, even if there is no rational basis for the distinction made by DR 2-102(B) and DR 2-102(C), this does not mean that DR 2-102(C) alone may not be upheld. As this Court noted in *Semler v. Oregon State Bd. of Dental Examiners*, 295 U.S. 608, 610, 79 L.Ed. 1086, 55 S. Ct. 570, 571 (1935), "The State [is] not bound to . . . strike out evils at the same time or in the same way." In other words, [R]eform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind." *Williamson v. Lee Optical*, 348 U.S. 483, 489, 99 L.Ed. 563, 75 S. Ct. 461, 465 (1955).

Jersey Supreme Court in the context of its introductory remarks about television advertising.[2] The NJSBA emphatically denies the truth of Appellant's contention. Not only is it frivolous, but it is based upon a gross distortion of the record. In addition, Appellee respectfully asserts that the principles enunciated by this Court in *Friedman* and other cases are dispositive of case at bar.

Appellant bases its conclusion that DR 2-102(C) is specifically designed to prevent out-of-state competition on the following remark by the New Jersey Supreme Court, taken entirely out of context:

> ". . .We do know that if petitioner were allowed to use its firm name in New Jersey in *any* form its television advertising could give it a substantial competitive advantage." (J.S., page 34) (emphasis theirs).

In truth, the Supreme Court was expressing its concern over the unfair competition which would occur if Appellant were permitted to operate in New Jersey under the name of Jacoby & Meyers. Because Jacoby & Meyers advertises on New York television channels which reach New Jersey consumers, the firm would have an unfair advantage over New Jersey lawyers, who must comply with the rule against television advertising. In fact, the real purpose of DR 2-102(C) is not to prevent competition but to prevent deception of consumers of legal services. And although competition, as Appellant argues, is not something the State of New Jersey has a "substantial legitimate governmental interest" in preventing (J.S., page 35), *deception* most certainly is.

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2. At the outset of its opinion, the New Jersey Supreme Court noted that in order to permit its recommended full evaluation of DR 2-102(C), the Court's ban on television advertising in DR 2-102(D) should also be considered.

As the New Jersey Supreme Court emphasized and Appellant conceded, the use of a law firm name is a form of commercial speech and nothing more. In re *Professional Ethics Advisory Committee Opinion 475*, 89 N.J. 74 (1982), citing *Friedman v. Rogers*, 440 U.S. 1, 59 L.Ed. 2d 100, 99 S. Ct. 887 (1979). Although this Court has recognized that commercial speech warrants *some* constitutional protection, *Virginia Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 48 L.Ed. 2d 346, 96 S. Ct. 1817 (1976) (holding that the State of Virginia could not prohibit *all* advertising by pharmacies of prescription drug prices), it has *never* afforded it the degree of protection which accompanies political expression. For example, in *Central Hudson Case v. Public Service Commission*, 447 U.S. 557, 2350 65 L.Ed. 2d 341, 563, 100 S. Ct. 2343 (1980), this Court stated that "there can be no constitutional objection to the suppression of commercial messages . . . more likely to deceive the public than inform it." See also, *Virginia Pharmacy, supra* "[A] different degree of protection is necessary to insure that the flow of the truthful and legitimate commercial information is unimpaired." 425 U.S. at 771, note 24, 96 S. Ct. at 1830, note 24. Accordingly, the New Jersey Supreme Court, which regards law firm names as "official" designations and therefore regulates them more carefully than ordinary advertising, seeks merely to insure that the official status of an attorney as one licensed to practice in New Jersey is conveyed to the public with accuracy and clarity. See *In re Professional Ethics Opinion 447*, 86 N.J. 473 (1981) citing *Central Hudson Gas, supra*.

The position taken by the New Jersey Supreme Court and the NJSBA is further supported by two recent cases decided by this Court, *Friedman v. Rogers, supra* and *In the Matter of RMJ*, 50 U.S.L.W. 4185 (January 25, 1982). In *Friedman*, the Court noted that not even

all types of *commercial* speech are entitled to identical constitutional protection. For example, the Court distinguished the objective and easily verifiable price information at issue in *Virginia Pharmacy, supra* (prescription drug prices) and *Bates v. State Bar of Arizona*, 433 U.S. 350, 53 L.Ed. 2d 810, 97 S. Ct. 2691 (1976) (prices of routine legal services) from the potentially more misleading information conveyed through the use of a trade name. The speech involved in the former two cases is self-explanatory, however, in the latter case "there is a significant possibility that trade names will be used to mislead the public." 440 U.S. at 12-13. Similar to what the New Jersey Supreme Court did in upholding DR 2-102(C), in *Friedman*, this Court balanced the value of trade names against their potential to mislead and found no alternative but to uphold the prohibition against the use of trade names by optometrists. As the New Jersey Supreme Court pointed out, "It is precisely the potential for misleading the public through 'ill-defined associations' inherent in trade names which Disciplinary Rule 2-102(C) seeks to address and which the use of the firm name Jacoby & Meyers might engender". *In re Professional Ethics Advisory Committee Opinion 475*, 89 N.J. at 74, 85 (1982).

The other pertinent case, *In the Matter of RMJ*, in which this Court invalidated an unrelated restriction placed on attorney advertising by the State of Missouri, likewise emphasized that the states may constitutionally prohibit both inherently misleading advertising and advertising that experience has shown is subject to abuse. 50 U.S.LW at 4188-4189. Again, this is precisely what the Supreme Court of New Jersey is trying to do.

As a final note—although the argument is not raised by Appellant in its Jurisdictional Statement—the NJSBA desires to point out that allowing Appellant to use the name Jacoby & Meyers in New Jersey, but requiring the

two named partners to use some sort of disclaimer stating that neither of them are members of the New Jersey bar, would be a more confusing rather than less restrictive alternative. More likely than not, it would even increase the potential for deception by, for example, implying to prospective clients an official disapproval of the firm's practice (See Footnote 1, *supra*). With or without a disclaimer, the use of a firm name in New Jersey that includes attorneys not admitted to the New Jersey bar is certain to deceive some people. Such use of Jacoby & Meyers name has already caused problems elsewhere.[3]

B. *Equal Protection Clause*

Appellant argues that the New Jersey Supreme Court erred in not applying the strict scrutiny test to its rules which distinguish between deceased partners and out-of-state attorneys with respect to law firm names.[4] (J.S., pages 41-42). In Appellant's words,

> "The New Jersey Supreme Court arrived at the wrong conclusion because it applied the wrong standard of review. The Court assumed that there is no free speech interest in a trade name and simply applied the rational basis test which is used to analyze statutes which do not involve fundamental rights or do *not* make distinctions on the basis of suspect classifications." (J.S. pages 39-40) (Emphasis theirs).

With all due respect, the Court assumed no such thing. As this Court has ruled and as Appellant concedes (J.S., page 41), commercial speech is entitled to less protection

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3. Messrs. Jacoby & Meyers recently lost their motion to dismiss an action filed in the New York State Supreme Court by the New York Criminal and Civil Courts Bar Association, charging them with misrepresenting themselves as attorneys licensed to practice in New York. *N.Y. Law J.*, April 5, 1982, at 12.

4. See footnote 1, *supra*.

under the First Amendment than the type of political speech involved in *Police Department v. Mosley*, 408 U.S. 92, 33 L.Ed. 2d 212, 92 S. Ct. 2286 (1972), which appellant asserts provides the correct standard of review for this case. See *Friedman v. Rogers*, 440 U.S. 1, L.Ed. 2d 100, 99 S. Ct. 887 (1979). Appellant, relying on *Mosley*, would nevertheless have us believe that wherever "free speech is implicated, the statute is to be subject to strict scrutiny." (J.S., page 38) The NJSBA respectfully submits that this is not the law as this Court has decided it. In *Mosley*, this Court struck down as violative of the Equal Protection Clause an ordinance prohibiting picketing near schools *except* by organized labor. The Court noted, as Jacoby & Meyers does, that "the Equal Protection Claim" was "closely intertwined with First Amendment interests. . ." (J.S., page 38-39, citing 408 U.S. at 95, 33 L.Ed. 2d at 216, 92 S.Ct. at 2286 (1972). However, the fact that an Equal Protection claim involves consideration of First Amendment interests does not change the rule that commercial speech is less protected and therefore any regulation thereof is not subject to strict scrutiny. Accordingly, there is no need for this Court to consider whether the strict scrutiny analysis of *Mosley*, *supra*, should be applied to commercial speech, it having already determined the applicable principles in previous decisions.

Appellant makes an alternative argument that even under the rational basis test, which was correctly applied by the New Jersey Supreme Court, the disciplinary rule is invalid. (J.S., page 45, footnote 9). The rational basis test applies to DR 2-102(C) because it neither infringes upon a fundamental right nor burdens a suspect class of individuals. As the New Jersey Supreme Court pointed out,

> "Certainly, lawyers who are not licensed to practice in New Jersey do not constitute a suspect class such

> as race, religion or alienage deserving of extraordinary protection under the Equal Protection Clause. (citation omitted) Nor is the right to use one's law firm name of fundamental importance in our ordered schemo of liberties." *In Re Professional Ethics Advisory Committee Opinion 475*, 89 N.J. 74, 94-95.

Contrary to what Appellant believes, there *is* a rational basis for distinguishing between the use of names of deceased or retired partners and the use of names of persons who have never been licensed to practice law in New Jersey. (See footnote 1, *supra*) The Rule is rationally related to New Jersey's goal of protecting prospective consumers of legal services, which is all that is required to satisfy the rational basis test. *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 66 L.Ed. 2d 659, 101 S. Ct. 715 (1981).

C. *Commerce Clause*

Appellant's position is that the Commerce Clause issue simply amounts to a question of whether or not a state may constitutionally adopt rules for lawyers which are designed to protect them from out-of-state competition. (J.S., page 46). In short, Appellant's answer to that question is that statutes enacted for the purpose of protecting local economic interests are virtually *per se* invalid. (J.S., page 47, citing *Philadelphia v. New Jersey*, 437 U.S. 617, 57 L.Ed. 2d 475, 98 S. Ct. 2531 (1978)). The NJSBA concedes that if this were in fact the design of DR 2-102(C), this Court might see fit to invalidate it. However, the rule is *not* designed to prevent out-of-state competition, despite the unreasonable inferences Appellant draws by taking the New Jersey Supreme Court's remarks about television advertising out of context. (See discussion in Part A, *supra*). Again, the Supreme Court was merely expressing its concern over the unfair compe-

tition which would occur if appellant were allowed to use the name Jacoby & Meyers in New Jersey, due to the fact that Appellant advertises on New York television channels which are seen by New Jersey consumers, while New Jersey firms are prohibited from advertising on television. In fact, as discussed previously, the purpose of the rule is to prevent deception.

In *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 44 L.Ed. 2d 572, 95 S. Ct. 2004 (1975), wherein it was recognized that legal services are part of interstate commerce, this Court was careful to emphasize that it intended "no diminution of the authority of the State to regulate its professions." *Id.*, 421 U.S. at 793, 44 L.Ed. 2d at 588, 795 S. Ct. at 2016 (J.S., pages 45-46). Accordingly, this Court has held that under the Commerce Clause the "crucial inquiry" is whether the law is "basically a protectionist measure, or whether it can fairly be viewed as a law directed to legitimate local concerns, with effects upon interstate commerce that are only incidental." *Philadelphia v. New Jersey, supra*, 437 U.S. at 625, 57 L.Ed. 2d at 482, 98 S. Ct. at 2538 (1978). We have already shown that DR 2-102(C) is not basically a protectionist measure and that it can fairly be viewed as a law directed to the legitimate state concern of preventing deception of consumers of legal services. Moreover, in compliance with this Court's ruling in *Philadelphia*, DR 2-102(C) does not discriminate against interstate commerce. There is no discrimination because the disciplinary rule treats licensed non-resident attorneys the same as licensed resident attorneys. See also, *Huron Portland Cement Co. v. Detroit*, 362 U.S. 440, 4 L.Ed. 2d 852, 80 S. Ct. 813 (1960).

Alternatively, even if the rule is directed against interstate commerce, it clearly satisfies the two-part balancing test of *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 25 L.Ed. 2d 174 90 S. Ct. 844 (1970). See also, *Southern*

Pacific Co. v. Arizona, 325 U.S. 761, 89 L.Ed. 1915, 65 S. Ct. 1515, (1944). Applying that test, DR 2-102(C) is (1) rationally related to a legitimate state concern (again, preventing deception) and (2) whatever discrimination results is outweighed by New Jersey's interest in enforcing the rule. As the New Jersey Supreme Court emphasized, "The State's paramount interest in preventing deception in the practice of law overrides any incidental effect the rule might have on interstate commerce". *In Re Professional Ethics Advisory Committee Opinion 475*, 89 N.J. 74, 91.[5]

D. *Privileges and Immunities Clause*

Appellant agrees that the New Jersey Supreme Court was correct in stating that:

> "The Privileges and Immunities Clause insures that non-residents and residents receive equal treatment with respect to 'fundamental' *activities* whose restriction would 'hinder the formation, the purpose, or development of a single union'." (J.S., pages 49-50) (emphasis added).

In Appellant's view, however, this case turns on the issue of whether a law firm has the right to use the same name in more than one jurisdiction and not, as the New Jersey Supreme Court viewed it, on whether the practice of law

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5. Appellee wishes to remind the Court that it has upheld bar rules which burden interstate legal practice substantially more than DR 2-102(C). For example, in *Wilson v. Wilson*, 416 F. Supp. 984 (D.R. 1976), affirmed *mem.*, 430 U.S. 925, 97 S. Ct. 1540 51, L.Ed. 2d 768 (1977), this Court upheld an Oregon bar rule requiring that bar applicants declare their intention to become Oregon residents at the time of admission. In *Aronson v. Ambrose*, 366 F. Supp. 37 (DVI 1972), affirmed, 479 F2d 75 (3rd Cir.), *cert. den.*, 414 U.S. 854 (1973), this Court upheld a rule requiring all Virgin Island attorneys to be domiciled there.

is a fundamental privilege. The NJSBA submits that this argument is so lacking in substance as to be frivolous.

Appellant presents no authority for the proposition that the right to use its firm name in New Jersey is a "fundamental" privilege guaranteed by the Privileges and Immunities Clause. In reality, this Court has never held that to be the case. Furthermore, since the clause only insures equal treatment with regard to *fundamental* activities and the practice of law is not a fundamental activity, the clause does not guarantee the use of a name in connection therewith. See *Leis v. Flynt*, 438 U.S. 438, 58 L.Ed. 2d 717, 99 S. Ct. 698 (1979), (where this Court rejected the Privileges and Immunities Clause argument raised by individual New York lawyers who were refused permission to represent a defendant in an Ohio state criminal case). Moreover, as the New Jersey Supreme Court pointed out, DR 2-102(C) treats licensed non-resident attorneys precisely the same as licensed resident attorneys, which is all the Privileges and Immunities Clause requires. Non-resident attorneys have greater difficulty using their firm name in New Jersey only to the extent that they may face greater difficulty satisfying the requirements for being admitted to the New Jersey bar or continuing to practice in that state. However, those types of requirements have been upheld by this Court. *In Re Professional Ethics Advisory Committee Opinion 475*, 89 N.J. 74, 94, citing *Leis v. Flynt, supra; Wilson v. Wilson*, 416 F. Supp. 984 (D. Or. 1976), affirmed *mem.* 430 U.S. 925, 51 L.Ed. 2d 768, 97 S. Ct. 1540 (1977).

III. CONCLUSION

For all of the foregoing reasons, Appellee moves that this appeal be dismissed or the decision of the Supreme Court of New Jersey be affirmed.

Respectfully submitted,

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